JULIE SCHUMER, SBN 82814
Attorney at Law
PMB 120, 120 Village Square
Orinda, Ca. 94563
(925) 254-3650

Attorney for Petitioner
DAVID MICHAEL LEON

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID MICHAEL LEON, Petitioner, vs. JAMES A. YATES, Warden, Pleasant Valley State Prison; JAMES E. TILTON, Director California Department of Corrections, Respondents.	) Case No. _____))))))))))

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PETITION FOR WRIT OF HABEAS CORPUS

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PETITION FOR WRIT OF HABEAS CORPUS

DAVID MICHAEL LEON ("Petitioner"), through counsel, hereby petitions this Court, pursuant to 28 U.S.C. §2254, in this petition for the issuance of a writ of habeas corpus, vacating his conviction and sentence of 27 years to life for a violation of Penal Code section 187, first degree murder plus personal use of a weapon. Petitioner alleges as follows:

INTRODUCTORY ALLEGATIONS AND PROCEDURAL BACKGROUND

Jurisdiction and Current Case Status

1. Petitioner is presently unlawfully confined, restrained of his liberty and in the custody of James A. Yates, Warden of Pleasant Valley State Prison in Coalinga, California, and by James E. Tilton, Secretary of the California Department of Corrections.

2. Petitioner is so confined pursuant to the judgment of the Superior Court of Santa Clara County, State of California, in Case No. CC093326, rendered May 23, 2003.

3. Petitioner's conviction of murder and 27 years to life state prison sentence are in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction pursuant to the United States Constitution's Article I, section 9, clause 2 and 28 U.S.C. §§2241 and 2254. Venue is proper in the Northern District because Petitioner was convicted within it. (28 U.S.C. §2241(d).)

4. All issues raised in this Petition have been raised before all state tribunals in which the issues could be heard, to the exhaustion of Petitioner's state remedies. Petitioner has not previously sought relief arising out of the matter from this Court or any other federal court.

The Record

5. Petitioner is submitting concurrently with this Petition the state court opinion in his direct appeal H026042 dated February 24, 2006, the denial of review by the California Supreme Court on May 24, 2006, the Court of Appeal's opinion of February 7, 2007 following Petitioner's appeal of his restitution fines, the superior court's opinion denying his state habeas based on ineffective assistance of appellate counsel dated April 18, 2007 and the denial of review of said claim by the California Supreme Court on October 10, 2007. (Exhibits A, B, C, D, and E, respectively.)

Procedural History

6. Petitioner was charged with a violation of Penal Code section 187 (murder) in an information filed October 19, 2001 by the District Attorney of Alameda County. It was further alleged he had personally used a weapon. (Penal Code section 12022.5(a)(1).) Said murder was alleged to have occurred November 30, 1983. (4 CT 821-823.) Petitioner entered a plea of not guilty. Petitioner was at that time and at all times subsequent represented by counsel.

7. Petitioner was subsequently found guilty as charged and the use allegation was found true. (7 CT 1670.)

8. On May 23, 2003, the trial court denied Petitioner probation and sentenced him to state prison for 27 years to life. (7 CT 1819-1820.)

9. Petitioner's conviction was affirmed on direct appeal by the Sixth District in Case No. H026042 on February 24, 2006. Restitution fines were reversed and the matter was remanded to the Superior Court for a new hearing as to said fines. A copy of the opinion is attached hereto as Exhibit A. On May 30, 2006, the California Supreme Court denied his Petition for Review. A copy of the order denying review is attached hereto as Exhibit B. On June 20, 2006, the trial

court reimposed the fines from which order Petitioner appealed. On February 7, 2007, the Sixth District Court of Appeal reduced the restitution fine and struck the parole revocation fine. A copy of the Court' opinion is attached hereto as Exhibit C. Petitioner filed a petition for writ of habeas corpus in the Santa Clara County Superior Court on March 7, 2007 alleging ineffective assistance of appellate counsel. The Superior Court denied said petition in a written order filed April 18, 2007, a copy of which is attached hereto as Exhibit D. Petitioner refiled the petition in the Sixth District Court of Appeal on May 11, 2007. It was denied on July 16, 2007. Petitioner filed a Petition for Review based on this denial on July 25, 2007, which petition was denied on October 10, 2007. A copy of the order denying review is attached hereto as Exhibit E.

10. All of the claims made herein have been exhausted in the highest California state court. Petitioner has filed no other federal petition for writ of habeas corpus challenging the instant conviction.

11. The State court decision was contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United Sates. Title 28 U.S.C. Section 2254, therefore, imposes no obstacle to relief.

Summary of Facts Presented at Trial

A. The Prosecution's case in chief.

The discovery of the body of Marlon Bass and the crime scene investigation

On November 30, 1983, Deborah Gerkin, age 16, attended Del Mar High School. She had made plans with Marlon Bass and other friends to leave school and get high at lunch. (7 RT 888-889). Marlon did not show up. (7 RT 890).

On November 30 1983, Annie and Palmer Bass and their two sons,

Marcus and Marlon[1] lived at 2568 Custer Drive in San Jose. (6 RT 562-563; 589-590). Marlon was 20 years old. (6 RT 563). He had graduated Del Mar High School. (6 RT 564). He drove a 1968 Mustang. (6 RT 564-565). During November, 1983, the Bass's received a lot of hang up calls. (6 RT 640).

Mr. and Mrs. Bass arrived home from work at about 5:30 p.m. (6 RT 571; 592). The door to their residence was ajar and there was glass on the ground. (6 RT 571, 574; 593). Marlon was laying on the floor in the hall with a bat in his hand. (6 RT 575-576, 581-582; 593-594, 596). Mr. Bass attempted to revive Marlon and the bat rolled out of Marlon's hand. 6 RT 576; 594, 599). According to Mr. Bass, Marlon was stiff. (6 RT 594).

Nothing had been disturbed in the residence except a desk was out of place in Marlon's bedroom. (6 RT 577-578; 603- 604). However, the desk drawer where Marlon usually kept his money was locked. (6 RT 607-608; 650). Two cans and a towel were under Marlon's desk. (6 RT 636-637; 755-756). A $2 bill was found on the floor in Marlon's bedroom but no other money was present. 6 RT 582; 609). Mr. Bass did not find money in Marlon's room after the police left. (6 RT 582, 609).

Before the police arrived, Mr. Bass checked a safe Marlon had underneath his room and moved it into the garage. About a week later, Mr. Bass took the safe to a locksmith and it was empty. (6 RT 601-602, 623).

The night before he found Marlon dead, Mr. Bass had checked Marlon's room and found drugs. (6 RT 623-625; 648-649). Initially he testified he did not remember doing this. 6 RT 623). Mr. Bass removed two large buckets of

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[1] Because of the testimony of family members, the victim will be referred to at times as Marlon to avoid confusion.

marijuana and locked them in the trunk of a black car he had parked in the garage. (6 RT 626; 649, Exhibits A, B, C). Mr. Bass had spoken to Marlon regarding his drug dealing and constantly having friends over. (6 RT 638-639). Mr. Bass told the police he had found $4200 in Marlon's desk drawer on the Sunday before Marlon died. (6 RT 651). On Monday, there was no money. (6 RT 652). Mr. Bass had seen up to $10,000 previously in Marlon's room. (6 RT 653).

At the beginning of the investigation, Sgt. Brockman told Mr. Bass that his son was shot with possibly a .22 caliber weapon but he had not substantiated that yet with lab analysis. (6 RT 653). Brockman cautioned Mr. Bass about revealing any information about the case. (6 RT 658).

On the day he died, Marlon's car was parked around the corner facing the wrong way and nosed into the curb. (6 RT 654). A neighbor, Pamala Anderson, who lived at 2564 Tioga Way on November 30, 1983, saw Marlon park a green Mustang on the wrong side of the street in front of her house in the mid to late morning. (8 RT 880). He took a baseball bat out of the car and walked away. (8 RT 872-875, 878). He was wearing a red or blue work shirt. (8 RT 876). He walked south toward Custer. (8 RT 878).

Marlon Bass suffered five gunshot wounds and a small abrasion to his right forearm. (7 RT 679-681; 769). The cause of death was gunshot wounds to the chest and neck. (7 RT 695). From the state of the body and clothing, it appeared death occurred before 2:00 p.m. from shots fired from further than three feet away. (7 RT 678, 694; 806-808). Death in the morning of November 30, 1983 was consistent with the degree of rigor mortis and lividity observed. (7 RT 679).] Five bullets were recovered during the autopsy. (7 RT 681, 724). The bullets were Remington .22 caliber gold coat hollow point bullets and were most likely fired from a .22 caliber Rohm, RG Industry, Liberty Arms, Burgo, Arminus, or

Mossberg revolver. (7 RT 778-779). Seven dollars were in the wallet in Marlon's pants pocket. (7 RT 733-734).

According to the Medical Examiner, it appeared likely Bass was facing and approaching his assailant when he was first shot and the remaining shots were inflicted as he was attempting to flee and eventually fell. (RT 690-694).[2] In arriving at this opinion it appeared the Medical Examiner assumed that the shooter remained stationary. (7 RT 693).

San Jose Police Officer Willam Santos examined the crime scene. (7 RT 700-701). A glass panel nearest the latch on the Bass' front door was broken. (7 RT 708). There were bullet strikes in the walls of the residence near where Marlon's body was found. (7 RT 716-717). A bullet was recovered from the wall. (7 RT 723). No bullet casings were found. (7 RT 725). A $2 bill was recovered from the floor in the garage and a $2 bill was recovered from the night stand in Marlon's bedroom. (7 RT 732-733, 734; 762). Marijuana in two plastic bucket was found in a the trunk of a car in the garage. (7 RT 735-737, 767).

A gray button, from the right sleeve of Marlon's shirt, was recovered close to Marlon's leg. (7 RT 752-754; 769). Other items found at the scene included a Taco Bell cup, nunchukas, baggies with marijuana and white powder, a tan cloth bag with gold strings with a glass rod, and a balance scale. (7 RT 758-762).

Officer Santos agreed that moving things around at the crime scene can contaminate it and that that could affect the conclusions drawn. (7 RT 741-744).

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[2] According to defense expert Dr. John Thornton, Marlon Bass was shot by someone inside his bedroom. (RT 1955).

The ensuing investigation.

Many of Marlon's friends were interviewed about their contacts with Marlon and their whereabouts on the day of the offense.

David Brewster knew Marlon Bass from junior high and high school. (8 RT 815- 816). Marlon sold marijuana - and drove a green Mustang. (8 RT 817). He sold the drugs from Doerr Park, the 7-Eleven or a friend's house 90% of the time. The rest of the time he sold from his residence. (8 RT 817). Brewster saw Petitioner around the neighborhood and at Marlon's house once. (8 RT 818). Marlon did not have enemies or debts. (8 RT 818). Marlon kept his drugs in a bucket or a small wooden jewelry box in his room. He kept pre weighed drugs in a wooden drawer by his bed. (8 RT 819, 828-829). He kept his money locked in his desk drawer. (8 RT 819). Every once in a while, Marlon carried money in a wad. (8 RT 821). According to Brewster, besides himself, only a few others knew where Marlon kept his drugs and money although he was open with his drug dealing. (8 RT 837-838). Brewster told police the opposite, that many people knew Marlon's habits. (8 RT 836). He did not let too many people into his room. (8 RT 835). Marlon had a baseball bat which he kept in his bedroom and sometimes in the trunk of his car. (8 RT 822).

Brewster went to a movie with Marlon the night before his death. (8 RT 822). They were drinking and might have smoked a joint before going to the movie. (8 RT 832-833). Marlon did not have a falling out with Petitioner. (8 RT 847).

Brewster told officers Marlon picked up a couple of pounds of marijuana from Jeff Purrington on Monday, November 28, 2003. (8 RT 848-849.) Marlon had $1300 to $1400 left after buying the marijuana. (8 RT 849-850). On Tuesday night, Brewster saw Marlon with between $1000 and $1500 in his locked

desk drawer. (8 RT 850, 853-854). Brewster said Marlon was pretty open in his drug dealing and everyone he dealt with knew where his money and drugs were kept. (8 RT 851). Brewster said Marlon got some of the drugs from "Tony." (8 RT 852).

Jeffrey Purrington was with Marlon Bass at the Bass residence two days before Marlon' s death. (8 RT 857). Marlon gave Purrington $2000 to purchase marijuana. (8 RT 857). It appeared Marlon had about $2000 left over. (8 RT 857-858). Marlon kept his money in the center drawer of his desk which was locked. (RT 858, 869, Exhibit No. 30). He did not see money stored in any other place. (8 RT 858). Purrington delivered the marijuana later that same day. (8 RT 859). Marlon was nervous that day. (8 RT 860). Purrington told the police Marlon was under the influence of cocaine. (8 RT 861).

According to Purrington, Marlon was open and bragged about selling drugs. (8 RT 866). Purrington knew many of Marlon's customers. (8 RT 868). However, Marlon also dealt with a lot of people Purrington did not know. (8 RT 869). Purrington had never seen Petitioner and Marlon together. (8 RT 865).

Brothers Daniel and Samuel Barnett attended junior high school with Petitioner and Marlon Bass. (9 RT 979-980; 1011). Daniel was closer to Petitioner and Samuel was closer to Marlon Bass. (9 RT 981; 1011-1012). Daniel had gone to Petitioner's house one day when Petitioner was waiting for Marlon. (9 RT 982). Petitioner said he was "so pissed off at that fucking nigger. I could just kill him." (9 RT 982).] At the Preliminary Hearing Daniel testified that Petitioner had said, "that fucking nigger, I'll kick his ass." (9 RT 989). Daniel could not say what day or month he heard the statement, it could have been one to two years before the killing. (9 RT 991). At the Preliminary Hearing he said it was within six months. (9 RT 993). Petitioner disappeared after the murder and Daniel did not know

where he was for two or three years. (9 RT 983).

As much as a year and a half prior to the murder, Petitioner showed a gun to Daniel Barnett. (9 RT 984-985). Daniel never saw Petitioner with a gun on any other occasion. (9 RT 1003). In 2000, Daniel told Detective Vizzusi he never saw Petitioner with a gun but was pretty sure Petitioner's family had a gun in their house. (9 RT 1001).

Samuel Barnett had purchased marijuana from Marlon Bass and knew he dealt drugs out of his bedroom. (9 RT 1012). According to Samuel, Marlon "sometimes" kept his desk drawer locked. (9 RT 1026).

Before Marlon was murdered, Marlon complained about a falling out with Petitioner and said he might need to "kick his ass." (9 RT 1013). The day after Marlon died Petitioner called Samuel to ask him to purchase some marijuana. (9 RT 1013). Petitioner wanted $550 for a quarter pound. (9 RT 1014). Samuel was shocked because he thought Petitioner was a small time dealer. (9 RT 1014-1015). Samuel asked Petitioner if he knew that Marlon had been killed. Petitioner responded that it had nothing to do with the transaction. (9 RT 1017). Samuel told Petitioner never to call him again because he was uncomfortable that Petitioner might have had something to do with Marlon's death. (9 RT 1017). Samuel had been convicted of felony violation of a protective order and corporal injury on a spouse. (9 RT 1017-1018).

Shortly after Marlon's death, Samuel told the police Marlon was mad at someone who ripped him off and it was either Jeffrey Caplan or Petitioner and most likely it was Caplan. (9 RT 1028-1029). Marlon caught Jeff Caplan ripping off drugs from his house. (9 RT 1032). Marlon believed a man in a hooded sweatshirt was casing his house a few days before he died. (9 RT 1032-1033). Samuel saw the man in the hooded sweatshirt walk by. (9 RT 1033). Marlon

yelled at the guy and the guy said he was waiting for his girlfriend. (9 RT 1034). The guy then fled. (9 RT 1034). Marlon did not mention Petitioner as being the stalker. (9 RT 1037).

Troy Tibbils started Mar Vista High School with Petitioner but then transferred to another school. (12 RT 424-1425). Petitioner started hanging out with Bernard Wesley and the Smith brothers. (12 RT 1425-1426). Petitioner bought marijuana from Marlon Bass. (12 RT 1427). Petitioner told Tibbils that Marlon had money and drugs all over his room. (12 RT 1432). Petitioner had been attacked by David and Marvin Smith and told Tibbils to stay away from them. (12 RT 1473). Petitioner owned a BB gun. (12 RT 1474).

Tibbils related that Petitioner was in a car accident in 1983 and received a monetary settlement. (12 RT 1475). Petitioner received $2500 and some amount for medical. He also fixed his car and sold it. (12 RT 1477). Tibbils was never involved in a burglary and did not know Petitioner to be involved. (12 RT 1477-1478). Sometimes, Petitioner would make large purchases of marijuana and resell it. (12 RT 1483).

On the day Marlon was killed, Tibbils and Ron Delgado were with Petitioner at Petitioner's residence at about 10:00 a.m. (12 RT 1429). They were going to buy marijuana. (12 RT 1430). Petitioner said he could not get marijuana that day because Marlon was in school and he could get it later. (12 RT 1433, 1440, 1446). Tibbils went back to school and returned to Petitioner's residence around 12:30 or 1 p.m. and picked up the marijuana. (12 RT 1441-1442). He did not notice any difference in Petitioner’s demeanor. (12 RT 1470). Although Tibbils testified at trial that believed he made this purchase the day of the homicide, he had nothing to back this up. (12 RT 1448). By contrast, in 2000, he told Detective Vizzusi that he wasn’t sure that he was with Petitioner the day of

the killing. (12 RT 1454).

Four to five days later, Tibbil's father saw an article in the newspaper and asked him whether he knew Marlon Bass. Tibbils immediately telephoned Petitioner. (12 443). Tibbils had testified previously that Petitioner said he had met Marlon at the 7-Eleven that morning to get drugs. Petitioner told Tibbils he had seen Bernard Wesley near Marlon's residence on Curtner. (12 RT 1443-1445). Tibbils was unable to recall if he told Nicole DiFlavio, a mutual friend, that he had asked Petitioner if he was involved. (12 RT 1458, 1460). Tibbils did not believe Petitioner was involved. (12 RT 1461).

After the killing Tibbils saw less of Petitioner. When Petitioner told him he was going to New Mexico, Tibbils was surprised. (12 RT 1462-1463). Tibbils could not recall how long after the killing Petitioner left but at the preliminary hearing he stated it was six months. (12 RT 1464). Tibbils told Detective Vissuzi in 2000 that when Petitioner left town he owed people money. (12 RT 1481).

Detective Vizzusi interviewed Troy Tibbils on May 10, 2002. (13 RT 1527-1528). Tibbils felt the killing was the same day he bought marijuana from Petitioner. (12 RT 1528). Tibbils talked to Petitioner and Petitioner said he met Marlon at the 7-Eleven and purchased marijuana from him. Petitioner said after Marlon left he saw Bernard Wesley driving down the street and stop at a house on Curtner. (12 RT 1528).] Petitioner said Wesley was acting real suspicious. (12 RT 1528-1529). Tibbils said he had gotten a traffic ticket that day. By the time of trial records of that ticket were destroyed. (12 RT 1529). There was no indication Tibbils had been interviewed prior to 2002. (12 RT 1530). Detective Vizzusi testified that had he been interviewed earlier, there would have been better success in tracking down the ticket. (12 RT 1531).

Petitioner and Nicole DiFlavio were good friends and used marijuana and cocaine together in 1983. DiFlavio also was friendly with Marlon Bass. (12 RT 1485-1486). According to DiFlavio, Petitioner was envious of Marlon. (12 RT 1509). Tibbils told her Petitioner got marijuana from Marlon on the morning of the murder. (12 RT 1496, 1498). According to DiFlavio, Petitioner was very concerned about money. (12 RT 1490). After Marlon's death, Petitioner had a little more money and seemed to have more drugs which caused DiFlavio to become suspicious. (12 RT 1490). Admittedly, DiFlavio did not know if Petitioner was working. (12 RT 1501).

Petitioner left town shortly after Marlon's death without saying he was leaving. (12 RT 1488). On cross-examination, DiFlavio said he left between one to six months after Marlon's death. (12 RT 1504). A month or two after Petitioner left, he called DiFlavio from New Mexico or Arizona. (12 RT 1494). Petitioner never said he killed Marlon. (12 RT 1502).

Petitioner's statements about the Marlon Bass homicide

Danette Edelberg, formerly known as Danette Arbuckle, was Petitioner's girlfriend for three or four years in high school.[3] (13 RT 1550-1552). Danette talked to Petitioner almost every day. (13 RT 1558). Petitioner was physically abusive to her and was very jealous and possessive. (13 RT 1555-1556). Danette knew Marlon Bass from school but did not associate with him and did not know if Petitioner did. (13 RT 1556). It was common knowledge that Marlon was

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[3] Danette Arbuckle had a petty theft conviction in 1984. (13 RT 1578). The witnesses at trial referred to her as Danette Arbuckle and Danette Edelberg. She also used the married name Danette Rodriguez for a period of time. To avoid confusion, Danette will be used throughout this pleading.

involved in drugs. (13 RT 1674). According to Danette, Petitioner had large sums of money before and after Marlon's death. (13 RT 1674).

Petitioner acted as if the murder investigation regarding Bass was a joke. (13 RT 1557). Petitioner went to visit his father in San Diego sometime after the murder. (13 RT 1557). Danette told Inspector Brockman Petitioner told her he was moving to San Diego to be with his dad because his dad wanted him out of the environment and said she took him to the airport when he departed. (13 RT 1591-1592).[4] When he returned, the relationship and the physical abuse resumed. (13 RT 1560-1561).

On March 12, 1984, Petitioner and Danette had an argument. Petitioner became abusive and Danette went to a doctor and made a police report. (13 RT 1562). The argument ensued when they were discussing the Bass investigation. According to Danette, Petitioner admitted the murder. He said he went to the Bass home to steal money and drugs which were in Marlon Bass's desk drawer. He said he was in the bedroom when he heard a noise and Marlon was in the hall with a baseball bat. They had words, Petitioner became frightened and he shot Marlon. (13 RT 1563-1566). Petitioner demonstrated how he had held the gun. (13 RT 1567). Petitioner stood up and put hands out in front of him as though he were holding a gun and said he had shot Marlon. (13 RT 1567). When Danette started crying, Petitioner said he was just kidding. ((RT 1568). She tried to leave but he locked the door. He told her to get on her knees and he started kicking her. She crawled to the door. (13 RT 1569). She got outside, got in her car and left. (13 RT 1569, 14 RT 1744). That was the end of the relationship. (13 RT 1570). Danette didn't tell the police about his statements at the time she initially made the

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[4] Danielle admitted that she lied to the police during the course of the murder investigation. (13 RT 1581).

police report because she was scared. (13 RT 1571).][5]

According to Danette, she told Inspector William Brockman about Petitioner's statements and about his reenactment of the offense sometime after the reenactment.[6] She talked to Brockman six times between November 30, 1983 and February 10, 1984. (13 RT 1597; 14 RT 1745-1746). Danette told Brockman Petitioner had a pellet gun but no other gun, (9 RT 1680). On March 12, 1984, she spoke to Detective Vizzusi but she did not tell him about the reenactment. (13 RT 1603-1605). When she spoke to Sgt. Brockman on February 10 and February13, 1984, there had been no reenactment. (13 RT 1628). On March 13, 1984, she told police she felt 100% certain that Petitioner did not kill Marlon. (13 RT 1630). She never saw Petitioner with a gun. (13 RT 1679).

On June 9 and June 11, 1986, Danette was interviewed by Annette Rodriguez, a DA investigator, about the domestic violence charges she had reported against Petitioner in 1984. (13 RT 1572; 1733).[7] Danette told Rodriguez Petitioner had acted out the murder of Marlon Bass then said he was kidding. (13 RT 1574; 14 RT 1735). DAI Rodriguez contacted Inspector Brockman. However,

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[5] The report indicated Danette said she was slapped in the face, punched in the ribs, told to get on her knees and then she crawled out of the house. The report stated Petitioner kicked Danette in the buttocks. (14 RT 1743). Danette ran to her car and got inside while Petitioner was punching the windows. (14 RT 1744).

[6] She told another officer that as she drove, Petitioner followed her home. (13 RT 1603). On that occasion she did not mention the reenactment or Petitioner's alleged admission. (13 RT 1605).

[7] At the Preliminary Hearing Danette did not recall this conversation. (13 RT 1574).

no one followed up with Danette until she talked to Detective Vizzusi in 2000. (13 RT 1574; 14 RT 1736). The only other person Danette told about the reenactment was her best friend Danielle but she did not give her the details. (13 RT 1575, 1577). She never told her brother, Shelby Arbuckle, until years later. (13 RT 1575).

In 2000, Danette told Detective Vizzusi that the reenactment was in the midst of the murder investigation and could have taken place between December, 1983 and March, 1984. (13 RT 1626). At the Preliminary Hearing, she testified it could have been a year after the crime. (13 RT 1637). The portion of Vizzusi's interview with Danette where he asked her about the reenactment was not on tape. (17 RT 2069).[8]

In 2002, Danette met with Sgt. Brockman for lunch at the suggestion of the prosecutor who wanted them to remember the details of the reenactment. (13 RT 1572; 14 RT 1746). The lunch was not documented. (13 RT 1665). Danette told Brockman she had told him about the Petitioner's reenactment of the Marlon Bass murder when he interviewed her in 1984. Brockman had no memory of being told about the reenactment and had she done so he would have remembered. (14 RT 1746). If Danette had talked to him about the facts of the case before February 10, 1984, he would have written a report. (14 RT 1757). Brockman had no recorded contacts with Danette prior to February 10, 1984. (14 RT 1758).

Brockman was contacted by DAI Rodriguez in 1986 and she told

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[8] Vizzusi noted that with some interviews in the case the tape was turned on at some point into the interview. (17 RT 2075). Vizzusi noted that Danielle (infra) described the reenactment as showing the shooting to be execution style whereas Danette stated Petitioner put his right arm out. (17 RT 2079).

him about the reenactment. He was delighted to receive the information and made arrangements to interview Danette. He then decided to refer the matter to the homicide unit instead. (14 RT 1747). He prepared some questions for Danette and talked to Mo Reyes in the homicide unit. (14 RT 1748).

Danielle Fournier was a childhood friend of Danette's. [Exhibits Vol. 10:1361 (14 RT 1712).] Danette told her Petitioner had committed the murder of Marlon Bass and had reenacted the actual murder. (14 RT 1719). According to Danette, Petitioner made her kneel down and put a gun to her head and said he was going to do to her what he had done to Marlon. (14 RT 1719). Danette said Marlon was shot. (14 RT 1719). Danette told Fournier Petitioner said he was kidding. (14 RT 1726).

Danielle claimed Danette had called her and she went to pick Danette up at Petitioner's house right after the alleged reenactment but agreed she could have picked her up from someplace else. (14 RT 1721). Danette appeared afraid. (14 RT 1723). Danielle thought this was a week after Marlon's death. (14 RT 1724).

Shelby Arbuckle is Danette Edelberg's younger brother. (8 RT 899; 1553). Petitioner was his sister's boyfriend when Shelby was 12 to about 15 years old. [Exhibits Vol. 4:548 (8 RT 900). Petitioner was abusive to him and they used drugs together. (8 RT 900). Petitioner started Shelby selling joints of marijuana when Shelby was in the sixth grade. (8 RT 902). Shelby started selling marijuana in the seventh grade to kids at his junior high school. (8 RT 903).

Petitioner talked to Shelby about doing burglaries in the Doeer Park neighborhood. (8 RT 904). He described casing houses and discussed the ones he planned to hit. (8 RT 905). Petitioner never said he was going to hit the Bass residence. (8 RT 906). He did say a person should never burglarize a house where

the owner or occupier was a police officer.[9] (8 RT 945). Troy Tibbils, Ronny Cortez and Darryl Ramos were also involved in burglaries when Petitioner was involved. (8 RT 944). Shelby was not involved with Petitioner in burglaries but he was a lookout in burglaries involving other people. (8 RT 944). Petitioner mentioned having a gun one or two months before Marlon Bass died but Shelby did not see it. (8 RT 906-907). On cross-examination, Shelby thought Petitioner mentioned the gun a lot longer before that. (9 RT 967).

The day after Marlon Bass's death, Shelby heard a rumor about it. Shelby told the rumor to Danette and Petitioner. (8 RT 908). Petitioner laughed and said Marlon had not been stabbed; he had been shot. (8 RT 909). Petitioner said someone had broken into the Bass residence, that the perpetrator was in Marlon's bedroom and was surprised by Marlon Bass. Petitioner said Marlon was shot once or twice in the heart. (8 RT 909). Shelby's memory was foggy about that part. (9 RT 965). According to Shelby, at the time of the statements, there had been nothing in the newspaper or news about the murder. (8 RT 911). Later, Shelby saw a newspaper article about the murder which in his opinion was consistent with what Petitioner had told him. (8 RT 911). Shelby did not notice any thing unusual in Petitioner's demeanor after the killing. (8 RT 946).]

According to Shelby, a month to three months later, Petitioner admitted his involvement in the murder. (8 RT 913). He said he had hired two Black men to do the burglary for him and the police were looking in the wrong direction. He said the men were big and had played for the San Francisco 49ers. He and the men he had hired were going to split the money and drugs they took from the Bass residence. (8 RT 913). Petitioner was confident and cocky. (8 RT

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[9] Marlon Bass's father Palmer Bass was a police officer. (6 RT 592).

914).] In another conversation, Petitioner said there was a drawer full of drugs and money. He said the perpetrator was going to wait for Marlon to leave. Then he was going to go into the back door of the house. He would then go directly to Marlon's room where he knew there was a drawer full of money and a separate drawer full of drugs. (8 RT 915-917). He said the perpetrator was caught by surprise when Marlon sneaked up with a baseball bat. (8 RT 917). The perpetrator shot Marlon, who was in the hallway, twice. (8 RT 917- 918).

According to Shelby, Petitioner was strapped for money before the murder. (8 RT 920). After the murder, Petitioner started buying gifts for Danette and his mother. (8 RT 921). Petitioner also had cocaine and a triple beam scale. (8 RT 921-922). Petitioner left town for about four months. (8 RT 922-924). He said he left because the police were bothering him and investigating him for the Bass murder. (8 RT 925). Petitioner never said he killed Bass. (8 RT 943).

Shelby had only recently disclosed all this information to Detective Vizzusi in 2002. (8 RT 927).

Mary Keasling was Petitioner's girlfriend starting on December 27, 1990 until December 1994. (11 RT 1346-1347). The relationship ended because Petitioner left Alamogordo, New Mexico. (11 RT 1348).

One night in 1991 when Keasling had been drinking, Petitioner told her he was a suspect in a murder that happened when he was seventeen years old. (11 RT 1350). He knew the victim who was a drug dealer and had been a friend. (11 RT 1351). Although she told officers Petitioner told her the victim had been shot, Keasling was unable to recall the topic at trial. (11 RT 1353, 1357). She was unable to recall if a statement was made about the victim being Black. (11 RT 1354). Petitioner said no weapon had been found. (11 RT 1355). He did not say anything regarding fingerprints. (11 RT 1355). Petitioner said he had been to the

guy's house that day to pick up drugs and had left before it happened. (11 RT 1357). He said he saw someone else approach the victim's house as he left. Keasling recalled the name of the person was Ed, Eddie, Fred or Freddie or Jack or Jackie. (11 RT 1357). Petitioner never said he killed Bass. That would have caused her concern. (12 RT 1370).]

According to Keasling, when she was interviewed by the officers in 2000 about what Petitioner had told, she had been drinking and they were rude to her. (11 RT 1358). Officers told her she was going to jail for being an accessory to murder. (12 RT 1386). Keasling felt they were trying to get her to make certain incriminating statements about Petitioner such as that he committed the crime in self-defense. (12 RT 1373-1374). She felt threatened and felt the officers could make trouble in her life. (12 RT 1382). She kept telling them Petitioner never mentioned self-defense, all he said was the victim had been murdered. (12 RT 1382). The officers played her a snippet of a tape of Petitioner's father saying Petitioner had said it was self-defense and told her self-defense could potentially help Petitioner. (12 RT 1389-1390). Keasling would not lie under oath for Petitioner. (12 RT 1374).

Keasling's interview was tape recorded and the tape was played for the jury. (21 RT 2398-2399). The officers said that if she knew about a crime and did not tell about it she could be prosecuted as an accessory. (6 CT 1427.) According to Keasling, Petitioner told her there had been a murder but he did not know anything about it. (6 CT 1429.) They were drinking when it was discussed. (CT 1429, 1439.) The officers asked Keasling if self defense was involved and told her Petitioner's father had said it was self defense. (6 CT 1430-1431, 1435, 1440, 1445-1446.) She said Petitioner had beaten her but he wouldn't kill a cat even when she begged him because it was injured. According to Keasling,

Petitioner was incapable of committing a murder. (6 CT 1430, 1498.) Keasling insisted she did not know anything and he never mentioned self defense. She insisted Petitioner had caused her much pain and she would never lie for him. (6 CT 1432, 1436-1438, 1440, 1443-1448, 1458-1461, 1463, 1468-1469, 1472, 1475-1477, 1486-1487, 1503-1504.) The officers threatened to get the FBI involved and to arrest her for conspiracy. (6 CT 1478.) She persisted in saying she knew nothing. (6 CT 1479, 1483.) The officers threatened to arrest her and she told them to go ahead because she didn't know anything. (6 CT 1502-1504.) She said she did not like being threatened in her own home. (6 CT 1504.)

Keasling told the officers all Petitioner said was he had been under suspicion for murder when he was 17 or 18, the victim was a friend, was shot, was Black and a drug dealer and he had been to the victim's house the day before or the day after it happened. (6 CT 1434, 1436, 1448-1449, 1451.) He said no fingerprints or weapon was found. (6 CT 1449.)

David Michael Leon is Petitioner's father. (14 RT 1766). Mr. Leon did not recall Petitioner visiting him in San Diego unexpectedly in late 1983 or early 1984 but he did recall Petitioner being in New Mexico in July of 1984. (14 RT 1771-1772). Petitioner stayed with him in San Diego from one to three weeks at times when he visited. At that time Mr. Leon lived with a woman who was not keen on his children visiting him. (14 RT 1772). Petitioner lived in Alamogordo in the 1990s. (14 RT 1774). Mr. Leon admitted he told officers his son had first mentioned the homicide in 1982 when he was living in San Diego. (15 RT 1882).]

The police came to Mr. Leon's house in New Mexico in 2000 to discuss Petitioner's alleged involvement in the Bass homicide. (14 RT 1779). He was home alone. (14 RT 1828).] Mr. Leon was not expecting them and the interview lasted nearly an hour and a half. (14 RT 1792). He was nervous. (14

RT 1792). At the beginning of the interview, he told the police he all he knew was that Petitioner had told him he had been a suspect. (14 RT 1783, 1832). He could not recall when Petitioner told him this but he (Mr. Leon) was not concerned at the time. (14 RT 1788-1789).

Mr. Leon lied to the police in stating that Petitioner told him he had killed Bass in self-defense. (14 RT 1767, 1799, 1800). Petitioner did not tell him this. (14 RT 1800, 16 RT 1889). He did this to help Petitioner and regretted having done so. (14 RT 1864). He felt threatened in the middle of the interview. The officers didn't seem satisfied with the answers he was providing. (14 RT 1795-1796). They threatened him with prosecution for accessory to murder. (14 RT 1795-1796). Mr. Leon was concerned about this. (14 RT 1859). Mr. Leon believed that if he would corroborate that it was in self defense he would be helping his son. (14 RT 1802-1803). The police gave him this impression. (14 RT 1802). He felt if he agreed on the self-defense issue it would be the end of the interview. (15 RT 1860). He felt the police pressured him to say something that wasn't true. (14 RT 1797). Toward the end of the interview he made up answers. (14 RT 1798). During the interview, the police played him a snippet of a tape of Petitioner's 2000 interview with the police wherein he said, "My father, I told him. . ." (15 RT 1888, 17 RT 2033).

Mr. Leon had been drinking alcohol before the officers arrived. (14 RT 1827-1828). He was into his second six pack of beer. (14 RT 1828). He told the officers he had a problem with drinking and sometimes Petitioner talked to him when he had been drinking. (14 RT 1837). Detective Vizzusi opined that Mr. Leon did not show objective symptoms of intoxication. (16 RT 1958).

Mr. Leon's statements to the officers were recorded and played for the jury. (16 RT 1963).

Mr. Leon told the officers Petitioner might have mentioned a friend of his being murdered in 1983. (6 CT 1283, 1290). Mr. Leon said Petitioner might have mentioned he was a suspect in the case but Mr. Leon often called Petitioner when Mr. Leon had been drinking. (6 CT 1287, 1307, 1317). Early on in the interview, the officers told Mr. Leon that if he was untruthful he might be charged with something and if he had knowledge and concealed it he might be an accessory, a theme which was repeated. (6 CT 1288-1289, 1306). The officers also told Mr. Leon he might help by corroborating what Petitioner had said. (6 CT 1289, 1296). Mr. Leon denied knowing anything about the crime but acknowledged several times Petitioner mentioned he was a suspect. (6 CT 1297, 1298, 1301, 1304, 1320). The officers again told Mr. Leon he could be prosecuted and implied Petitioner had said it was "self defense." (6 CT 1306-1307). Shortly thereafter, Mr. Leon said Petitioner had said it was self defense. Mr. Leon said Petitioner had not elaborated and did not mention a gun. (6 CT 1308, 1309-1310, 1315). The officers told Mr. Leon the crime scene corroborated the self defense claim. (6 CT 1315). When asked, Mr. Leon agreed Petitioner might have said something about a baseball bat. (6 CT 1316, 1324). He said he was probably drinking the night Petitioner talked to him. (6 CT 1323, 1329).

Petitioner was interviewed by the police on March 16, 2000. (6 CT 1332).] His statements were recorded and played for the jury. (17 RT 2037).

Petitioner met Marlon Bass at a party then started selling drugs for him. Eventually, Petitioner branched out and conducted his own sales. Petitioner had been to Marlon's house. (17 CT 1339-1342). Marlon would have sales lined up on the street and would throw his money in a big drawer. He did not allow people into his house. However, Petitioner was allowed in. (17 CT 1343). Petitioner told some of his friends about all the money. (17 CT 1344). Bernard Wesley started

hanging around. (17 CT 1344). Wesley had stolen some drugs from Petitioner. (17 CT 1344-1345).]

Petitioner first said he did not remember seeing Marlon Bass on the day he died. (17 CT 1333).] Later, Petitioner said he thought he stopped by to see Marlon on that day but did not think he went into the Bass residence. (17 CT 1346).] When Petitioner was in the neighborhood in his car, he saw Bernard Wesley and somebody with Wesley on Leigh Avenue. (17 CT 1346-1347, 1352).] Wesley was moving very fast. (18 RT 2152).] Petitioner also had someone with him in the car but he did not recall who it was. He named a number of his friends as possibilities. (17 CT 1349, 1354-1356).] He had told the police about this when interviewed shortly after the killing. (17 CT 1353).] He was aware then that he was being looked at for the crime. (6 CT 1382-1383).

When asked, Petitioner said Marlon had been shot with a .22 caliber gun by someone who entered his house for dope or money while he was gone. Somebody, such as a police officer, told Petitioner this or he read it in a newspaper. (6 CT 1377-1378).[10] He was told that someone went into Marlon's house for dope or money. Marlon had left and come back for some reason. According to Petitioner, Marlon carried a souvenir bat under the seat in his car. (CT 1378-379). Petitioner did not know if Marlon had a gun. (CT 1379-1380).

Petitioner was probably working at Great Western Bank during this time period. (6 CT 1358).

Danette was Petitioner's girlfriend at the time. (6 CT 1355). Danette asked him if he was involved in the murder and he told her he was not. (6 CT

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[10] According to Detective Vissuzi the caliber of the weapon used was never publicly divulged. (18 RT 2157).

1392). If Danette had said otherwise, she was lying. (6 CT 1392).

Petitioner knew the Smith brothers. (6 CT 1361). Petitioner denied telling anyone he had been involved in Marlon's murder even as a joke or in anger. (6 CT 1370-1371). Petitioner said he was truthful when he was interviewed almost 20 years prior and said he hadn't seen Marlon for two weeks before Marlon's death. (6 CT 1373). However, Petitioner remembered owing Marlon some money and having to repay him. (6 CT 1373). He left town after Marlon's death because of drugs and because he was being investigated. (6 CT 1380-1384). He went to stay with his father in Murietta Hot Springs and then to New Mexico to stay with his grandmother. (6 CT 1384-1386). Some of his friends thought he had done it because of the way the police were acting. (6 CT 1391).

Petitioner adamantly denied killing Marlon Bass. (6 CT 1395, 1397). Petitioner denied telling anyone he was involved. (6 CT 1397-1398). During the interview, the officers told Petitioner that they believe they could prove he was involved and that it would make a big difference if it were a cold-blooded murder versus self-defense. (6 CT 1394). Petitioner denied being involved. (6 CT 1395).

Petitioner' s statements to Bernard Wesley and Wesley's activities on November 30 1983

At the time in question Bernard Wesley knew Petitioner and Marlon. (9 RT 1043-1044).

According to Bernard Wesley, prior to Marlon Bass's death, Petitioner told him that Marlon had good drugs. (9 RT 1046). Petitioner said Marlon had at least $10,000 and they should steal money and drugs from him. (10 RT 1047). Petitioner said Marlon kept the money in a dresser drawer.(9 RT

1047).][11] He said it would be easy to break a window and reach his hand inside. (9 RT 1048). He said he knew Marlon's parent's schedule and it would be easy for him to get Marlon away from the house.(9 RT 1049). Petitioner said he would meet Marlon at the nearby 7-Eleven for a drug deal then double back to his house.(9 RT 1049). He said he would wear a ninja outfit which would conceal his face.(9 RT 1050-1051). He said he would need a gun in case Marlon went back.(9 RT 1051). Petitioner asked Wesley to participate. (9 RT 1052). According to Wesley, Petitioner's sister Dede was present during part of the conversation which took place in Petitioner's room. (9 RT 1053). Wesley also discussed the plot with Greg Chatman and the Smith brothers.[12] (10 RT 1140, 1154, 1176, 11 RT 1288).

Wesley saw a crime stopper program about the Marlon Bass homicide and heard about it through the streets. (9 RT 1056-1057).[13] He and a co-worker Tim Pantiga joked about the murder. (RT 1057). He thought this happened after there was something in the paper about the killing. (9 RT 1057). Tim and Wesley often took work breaks together during which Tim read the newspaper. When Tim read him an article about the killing, Bernard did not tell him, "Those are my boys." (9 RT 1091, 1098). He denied telling Tim that he (Bernard) committed the murder or that the police were looking for him in

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[11] Wesley had been in Marlon's room before. (9 RT 1045, 1117). He also had his phone number. (10 RT 1131).

[12] Gregory Chatman knew Bernard Wesley in 1983. Wesley did not tell him that he had ever been told about a plan to burglarize the home of Marlon Bass by Petitioner. (18 RT 2161).

[13] He claimed to have seen the program after his initial interviews with the police. 10 RT 1229).

connection with the case. (9 RT 1058, 1098). His friends teased him that the police were after him. (RT 1058). Wesley was angry with Petitioner for identifying him to the police as a suspect. (10 RT 1144, 1177).

Wesley first talked to the police by phone on December 12, 1983. He said he had seen a large amount of drugs in Marlon's desk drawer. (10 RT 1200). The purpose of his call was to report Petitioner's plan. (10 RT 1201). He went to the police station on December 20, 1983 and tried to tell the police everything he knew. (10 RT 1203). He claimed to have gotten nervous and tired so his intention was thwarted. (10 RT 1208). He denied telling the police that he had the conversation with Petitioner about the plan while they were watching the fights and was impeached with a contrary statement. (10 RT 1204-1205). He recalled telling the police he visited with Petitioner's sister that day and Petitioner was not home. (10 RT 1206). During that interview, Wesley stated that the Smith brothers (infra) were the only ones who would have the intestinal fortitude to go into Marlon's house with a gun. (18 RT 2123). Detective Vizzusi did not recall that in that interview Wesley said that the Smith brothers had wasted Marlon like they threatened to waste him. (18 RT 2122).

Wesley first told the police that on the day Marlon Bass died, Wesley was with a neighborhood friend named Renee. (9 RT 1061, 1073-1074, 10 RT 1256-1258). He also told the police he heard he was a prime suspect because he had heard Petitioner was naming him because Wesley had been in the area (9 RT 1133). When the police asked Wesley if he had driven down Curtner and stopped when he saw a couple he knew, his memory of where he had been was jogged. He had stopped to talk to the people; but, it turned out he did not know them so he

apologized.[14] (9 RT 1061-1062, 1069- 1071, 1074, 10 RT 1264). Wesley was driving a new Camaro Z28 painted white with multiple colored stripes. (9 RT 1082). The car was white, orange and black. (9 RT 1082). He denied keeping a roach clip in his car in 1983 and 1984. (11 RT 1289). He told the police he drove by Marlon's house. (12 RT 1285-1286). Before driving on Curtner, Wesley had been at Eastridge Mall buying an opal necklace and a pair of earrings for his girlfriend, Marianne Digiovanni. (9 RT 1062, 1265-1266). He bought the gift on credit. He previously testified he paid cash. (9 RT 1063). He no longer had a receipt for this purchase. 10 RT 1265). He thought he left the mall at 10:30 a.m. but it could have been 11:30 a.m. (9 RT 1071). He was on his way to Marianne's job when he saw Petitioner kneeling down at a phone booth at a 7-Eleven. (9 RT

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[14] Crystal Custodia lived at 1953 Curtner Avenue in San Jose in November of 1983. (12 RT 1511). The 7-Eleven was on the opposite side of Curtner. (12 RT 1512). In late 1983, a person in a "cool car" approached her and a friend named Bruce as they were standing in her front yard. (12 RT 1513-1514). She could not remember anything about him. (12 RT 1513). He said he thought they were someone else. (12 RT 1514). The person got out of his vehicle. (12 RT 1516). She did not remember the time of day this occurred or the day of the week. (12 RT 1514).

Inspector Joe Brockman interviewed Crystal Custodia on December 23, 1983. (12 RT 1520). She reported that she and her boyfriend were sitting in front of her house near a bus stop when a Black male, average build, driving a white Camaro or Firebird with an orange pinstripe pulled past the house, honked and backed up. (12 RT 1521-1522). He approached them, then said he thought they were someone else and departed. (12 RT 1522). She said it was a Monday or a Wednesday three to four weeks prior in the late afternoon between two and three p.m. (12 RT 1522-1523).

1064-1065)[15] They made eye contact. Petitioner looked like he was throwing up. (9 RT 1066). Wesley went to Marianne's job and gave her the jewelry.[16] (9 RT 1072).

Wesley knew David and Marvin Smith. 9 RT 1075). Wesley had seen Petitioner with David and Marvin Smith. (RT 1076). Wesley had taken some drugs from Petitioner before the murder of Marlon Bass. (RT 1076). Petitioner unsuccessfully tried to get payment from him and enlisted the assistance of the Smith brothers, who were physically large. (9 RT 1076, 1078-1079). David and Marvin Smith and Petitioner threatened to beat him up and take his car for a joyride. (RT 1077). Before Marlon's death, Wesley was at Petitioner's house when the Smith brothers confronted him about taking Petitioner's cocaine. (RT 1139). Bernard denied he was mad at Petitioner because of this. (10 RT 1171). At one point the Smith brothers asked his help to "take off" Petitioner. (10 RT 1162).

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[15] Marianne's job was near Camden Ave. and Hwy. 17. From the Eastridge Mall Wesley took Curtner all the way to her job. (9 RT 1064).

[16] Marianne Brown, formerly known as Marianne Digiovanni, was Wesley's girlfriend in 1983. Wesley gave her an aquamarine ring at the beginning of 1983. (12 RT 1539, 1547). He might have given her an opal necklace during her lunch break. He sometimes visited her at her job at lunchtime. The job was not far from Camden Ave. and Hwy 17. (12 RT 1540). He was not the type to give several items of jewelry at one time. (12 RT 1543). Brown vaguely remembered Wesley's involvement in a drug rip off. (RT 1542-1543). At that time Wesley used and sold drugs. (12 RT 1541). She told a defense investigator she was not certain that Bernard Wesley gave the ring to her for her birthday or Christmas but he was not the type of person to give her a ring out of the blue.

Wesley called the police on December 27, 1983 and reported he had seen David Smith walking on Bascom at 3:30 p.m. and that he looked different than when he had last seen him, now sporting a new hairstyle and expensive coat. (10 RT 1209). During this call, Wesley did not initially mention having seen Petitioner on Curtner. (11 RT 1278).

Wesley did not remember telling the police that he did not think Petitioner was involved in Marlon's murder. (10 RT 1185). He denied that he rode on a bus with the Smith brothers at some time after the murder. (10 RT 1186).

David and Marvin Smith are twin brothers.[17] (11 RT 1291; 1298, 1302). David frequented a deli on Bascom Avenue where Petitioner worked. (11 RT 1291; 12 RT 1474). Marvin knew Petitioner but denied having a relationship with him. (11 RT 1303). Neither Smith brother knew Marlon Bass or Bernard Wesley. (11 RT 1292; 1301, 1303, 1309). Neither brother was able to recall Petitioner asking him to collect a drug debt from anyone. (11 RT 1293, 1303). However, in 1984 they might have told the police that Petitioner had used them to collect a drug debt. (11 RT 1292; 1303-1304). Petitioner never asked them to rip off some drug dealers and they never told that to police officers. (11 RT 1292-1294; 1305). Nor did Petitioner tell them he was planning such a thing. (11 RT 1305). David never told Det. Vizzusi that Petitioner kept saying he wanted to rip-off somebody and he wanted to get their drugs nor that Petitioner offered to

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[17] In 1990, David Smith was convicted of misdemeanor destroying or concealing documentary evidence (Pen. Code § 135) and Marvin Smith suffered a misdemeanor conviction of false identification to a police officer in 1985 (Pen. Code § 148.9). (22 RT 2473).

pay him to do so. (11 RT 1294). Petitioner asked him and his brother to help at the store with a beer theft. (RT 1296-1297). David denied having a falling out with Petitioner. (11 RT 1297). After the police talked to David, Petitioner disappeared. (11 RT 1296-1297). David had never seen Petitioner with a gun. (11 RT 1299).

Former Officer John Kracht interviewed David and Marvin Smith on February 6, 1984. (11 RT 1312). David said he and his brother backed up Petitioner when he collected a drug debt from Bernard Wesley. (11 RT 1314-1315). He also said Petitioner wanted them to rip off some drug dealers and he said he would pay them. (11 RT 1315). Martin Smith was interviewed on February 4 and confirmed what his brother had told Officer Kracht. According to Marvin, Petitioner did not name the dealer and he said he was going to set it up. (11 RT 1316-1317). Petitioner said he knew the drug dealer and the dealer did not have a gun. (11 RT 1319). David said he had not seen Petitioner for six to seven months prior to February 6, 1984. (11 RT 1321).

Detective Gilbert Vizzusi interviewed David and Marvin Smith on February 11, 2000. (11 RT 1327). They confirmed the statements they had made in 1984 were true and accurate. (11 RT 1328). David recalled that Petitioner had asked him to participate in a robbery of a drug dealer. (11 RT 1329). At the time of these interviews Vizzusi had not completely excluded the Smith brothers as suspects. (11 RT 1331). Vizzusi told Marvin that his name had come up because Petitioner had pointed the finger at him and his brother. (11 RT 1337). At the time he interviewed the Smiths, Vizzusi also knew that Wesley had also made a statement identifying them as possibly being involved. (11 RT 1342).

B. The defense case.

Bernard Wesley and Timothy Pantiga were coworkers in late 1983 and early 1984 and they took breaks together. (18 RT 2223-2225). They would

smoke marijuana and read the newspaper. (18 RT 2225-2226). Wesley, who normally did not take an interest in the newspaper, was checking it for a few days looking for an article regarding a murder and a "Black kid" killed in a home invasion. (18 RT 2226). After he found the article, Wesley said "those were his boys." (18 RT 2227-2228). Pantiga told Wesley there was no statute of limitations on murder. (18 RT 2228). Later, when Pantiga visited Wesley at his residence to purchase marijuana, Wesley said the police wanted to talk to him about the murder. Pantiga told Wesley if he had nothing to worry about he should talk to the police. (18 RT 2229). Wesley admitted the killing. He quickly said he was joking and he didn't do it. (18 RT 2229).[18] Wesley appeared nervous like something was bugging him. (18 RT 2230). Wesley never said Petitioner asked him to commit a burglary of Marlon Bass. (18 RT 2232).

According to Pantiga, Wesley had a roach clip with a feather in his car. (18 RT 2232) Wesley borrowed Marianne Mai's car occasionally. (18 RT 2232).

Marianne Mai was the girlfriend of Bernard Wesley in the early 80's for two or three years. (18 RT 2236-2237). According to Mai, Wesley drove a white and red Camaro and carried a red roach clip with red feathers on it in the car. (RT 2237-2238). The clip matched the car. (18 RT 2238).

According to Dr. John Thornton, a forensic scientist, the crime scene processing in this case was rather casual. (16 RT 1926-1927, 1935). It was important to protect the crime scene to avoid contamination. (16 RT 1933). The crime scene was not limited to the immediate area where the body was found. 16 RT 1935).

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[18] Pantiga told a district attorney's investigator that he did not take this admission seriously. (18 RT 2233.)

The front door area of the Bass residence where the glass was broken and the bat should have been processed for fingerprints. (16 RT 1936-1938). The missing button and the injury to the victim's arm could be consistent with a struggle. (16 RT 1939-1940). There was no damage to the desk drawer, indicating it was not forced open. (16 RT 1942). A towel and a red feather were found in the victim's bedroom. (16 RT 1945). Dr. Thornton could not rule out the possibility of more than one perpetrator. (16 RT 1941). The evidence at the scene did not reveal much of a story. Nothing established the sequence of events. (16 RT 1947). Because there was only one bullet remaining in the wall with the others in Marlon, the positions of the shooter and Marlon could not be determined. (16 RT 1946).

In 1982, there had been a petty theft at the Bass residence and two theft related crimes on the same street. (18 RT 2165). Ken Auda was a suspect in the crime based on rumors he had been committing burglaries in the area. (RT 2166). However, Detective Vizzusi never interviewed Auda. (18 RT 2168). Vizzusi never attempted to interview Blaine Buscher or Kirk Woods who were mentioned in the investigation. (18 RT 2169-2170).

Petitioner was seen at the Arbuckle residence on January 24, 1984. (18 RT 2191).

Geoffrey Caplan lived around the corner from Marlon Bass in 1983. (18 RT 2240). Caplan broke into the Bass residence five times through a bathroom window to take drugs. (18 RT 2241-2242). According to Caplan, Marlon kept drugs and some money, but not his big money, in a small wooden box. He also kept money in a metal box. (18 RT 2242- 2243).

Marlon caught Caplan stealing about a year before the murder. (18 RT 2248). This caused their friendship to end. (18 RT 2249). About a week before Marlon died, Caplan and Marlon got into a scuffle. (18 RT 2244). In 1983,

Caplan's father owned a .22 caliber rifle. (18 RT 2244). According to Caplan, he was with Eddie King on the day of the murder. (18 RT 2252).

Caplan was unaware of a falling out between Petitioner and Marlon Bass prior to Marlon's death. (20 RT 2312).

Kenneth Pitts interviewed Caplan on July 2, 1985. (18 RT 2257). Caplan told him Marlon bass kept his money and drugs in a small handmade wooden box. (18 RT 2257).

According to defense investigator Robert Bortnick, Shelby Arbuckle said he had a conversation with Petitioner about Marlon's death between 24 to 72 hours after the death. His sister Danette was present. (20 RT 2286). Shelby said at some point Danette had told him about the reenactment. (20 RT 2287).

A pay owe sheet recovered from Marlon Bass's bedroom reflected a person named Dave L. owed $40. (20 RT 2338-2339).

In an interview with Danette Edelberg on February 10, 1984, Inspector Brockman told her Bass attacked the perpetrator who was in the bedroom with a baseball bat. (20 RT 2321-2322).[19] He possibly told her Marlon's connection had cut him off because his drugs were not good and he was getting them elsewhere. 20 RT 2323). Brockman possibly disclosed the caliber of the bullets to Palmer Bass. (20 RT 2340). During an interview of Anthony James, a drug dealer who knew Marlon through the drug trade, on December 22, 1983, the involvement of a .22 weapon was mentioned. (20 RT 2342-.2343).

Petitioner telephoned Detective Brockman at 2:09 on December 2, 1983. He told Brockman he had seen Bernard Wesley near Marlon Bass's

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[19] In his conversations with Danette, Brockman discussed with her that Petitioner worked as a bank teller and that he was earning good money. (20 RT 2328-2329).

residence on November 30, 1983. (20 RT 2314, 2316). Wesley stopped, backed up and left in a big rush. (21 RT 2388). Petitioner told Inspector Brockman that he and Marlon Bass had been friends for 4 ½ years and he saw him at least five times a week. (20 RT 2354). He said he knew Marlon did not have a gun and he saw $15,000 in Marlon's money drawer once several months before the murder. (20 RT 2354). He said he stopped seeing Marlon two weeks before the murder and he did not go to Marlon's funeral. (20 RT 2354). Petitioner mentioned working at Great Western Bank as the reason he did not see Marlon for two weeks. (20 RT 2359-2360).[20] Petitioner said he had no grudges against Bernard Wesley. (20 RT 2355). He said he did not think Wesley killed Marlon Bass. (20 RT 2356).[21]

Bernard Wesley called Brockman on December 12, 1983. Bernard Wesley told him two "Black guys," David and Martin, beat up Petitioner twice, once when they ripped off cocaine and again when he damaged their front door. (RT 2325). They intimidated him into telling them about drug dealers so they could rip him off. (20 RT 2326). Wesley also said that he had had a conversation with Petitioner three weeks earlier where Petitioner mentioned how much money Marlon had and he (Petitioner) was impressed. Wesley inferred from that that Petitioner wanted to rip off Marlon. (20 RT 2326).

Petitioner had a phone interview with Brockman on December 20,

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[20] Brockman did not recall following up on Petitioner's statement about working at Great Western. (20 RT 2331).

[21] Petitioner called Brockman on February 8, 1984, upset because Danette had called him, hysterical, asking if she should talk to the police. Petitioner was upset bout being investigated and said he was calling from San Diego. (20 RT 2351.)

1983. (21 RT 2385). Petitioner said he owed Marlon $20 or $30 at the time of his death. He told Brockman he had seen money in Marlon's money drawer and that on the day of Marlon's death, he saw Wesley cruising on Curtner. (21 RT 2388). Wesley stopped, backed up and left the area in a rush. (21 RT 2388). Wesley was interested in the subject of Marlon's money drawer. (21 RT 2388).

C. The prosecution's rebuttal.

Eight fingerprints were collected from Marvin Bass's bedroom or the door to the bedroom by Officer Bill Santos. (22 RT 2475). Santos was unable to recall dusting the entry for fingerprints. (22 RT 2477). There was no record of the removal of any prints from the latch of the front door. (22 RT 2488). Santos collected a towel and a red fiber from Marvin's bedroom. (22 RT 2478). The crime lab described the fiber as a feather. (22 RT 2481).

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996, a state prisoner can be granted federal habeas relief only when the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." (28 U.S.C. 2254(d)(1); Williams v. Taylor 529 U.S. 362 (2000); DePetris v. Kuykendall 239 F.3d 1057, 1061 (9th Cir. 2001).

"Clearly established federal law, as determined by the Supreme Court of the United States" means the holdings, not dicta of the Supreme Court as of the time of the state court decision. (Van Tran v. Lindsey 212 F.3d 1143, 1154 (9th Cir. 2000), overruled on other grounds Andrade v. Lockyer, 538 U.S. 63, 75-77 (2003).) The "Supreme Court need not have addressed a factually identical case [;] §2254(d) only requires that the Supreme Court clearly determine the law." (Houston v. Roe 177 F.3d 901, 905 (9th Cir. 1999.) While state court decisions will no longer be overturned in the habeas context because they conflict with circuit caselaw, circuit decisions are still "persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and may help us determine what law is 'clearly established.' (Id., at p. 1154; Himes v. Thompson , 336 F.3d 848, 853 (9th Cir. 2003).)

As observed in Van Tran, supra, 212 F.3d at p. 1150:

> "A state court's decision can be 'contrary to' federal law either 1)if it fails to apply the correct controlling authority, or 2) if it applies the controlling authority to a case involving facts 'materially indistinguishable' from those in a controlling case, but nonetheless reaches a different result. A state court's decision can involve an 'unreasonable application' of federal law if

> it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." Also see Parle v. Runnells ___F.3d___, 2007 WL 2936652, *2-*3 (9th Cir. 2007).

The Van Tran court continued:

> "[W]hen analyzing a claim that there has been an unreasonable application of federal law, we must first consider whether the state court erred; only after we have made that determination may we then consider whether any error involved an unreasonable application of controlling law within the meaning of §2254(d). (Id., at 1155.) We will find an 'unreasonable application' only when our independent review of the legal question 'leaves us with a "firm conviction" that one answer, the one rejected by the [state] court, was correct, and the other, the application of the federal law that the [state] court adopted, was erroneous, in other words that clear error occurred." (Id., at pp. 1153-1154.)

CLAIMS FOR RELIEF

_____ **I. PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS WERE VIOLATED BY THE 17 YEAR PRE-ACCUSATION DELAY.**

Facts supporting this claim.

1. There was a 17 year delay between the time Bass was killed and Petitioner was accused of his murder. Bass was killed November 30, 1983, Petitioner not charged until April 28, 2000. Prior to trial Petitioner sought dismissal of the case on the basis of prejudicial delay in charging him, arguing the delay violated his federal and state due process right to a fair trial. (5 CT 1025-1035; 1160-1165.)

Trial counsel argued Petitioner was prejudiced by the long delay because he lost the right to have the case tried in juvenile court where, had he been found guilty, his maximum sentence was far less severe, the memories of witnesses were lost or faded; his own memory had failed which negatively impacted his ability to defend himself and he could no longer produce material evidence and witnesses. (5 CT 1030-1035.) The trial court conducted an evidentiary hearing and determined it would rule on the matter after trial. (3 RT 310, 412, 4 RT 488.) During argument on the motion following trial, defense counsel argued that lost physical evidence from the scene included the failure to fingerprint the baseball bat and glass and latch at the front door was prejudicial. (22 RT 2494-2497.) He also argued that Sgt. Pitts, who was one of the original investigating officers, had lost any memory of the case. (2 RT 2497, 18 RT 2260-2261.) He argued that Sgt. Brockman failed to recall discussing Petitioner's alleged reeanactment of the crime with Danette in 1984, the traffic ticket Troy Tibbils had received on the day of a drug deal between Petitioner and Marlon was unavailable, documentation of Bernard Wesley's purchase of jewelry on the day of the offense was no longer available, a witness who had seen Bernard Wesley near the Bass house on the day of the crime no longer had a memory of the event, Marlon's father could not recall with any precision when he removed drugs from Marlon's bedroom, Petitioner could not recall his own activities that day, his employment records were no longer available and Mitch Helms, from whom Petitioner had purchased drugs, was missing by the time of trial. (22 RT 2498-2499, 2502-2504.) Tapes of interviews with witnesses as well as of a telephone conversation between police and Petitioner in 1989 were missing by the time of trial and records of Danette's 1984 domestic violence action against Petitioner were unavailable also. (22 RT 2505-2507, 2508.) The Smith brothers' memory

was now impaired and they could no longer be cross-examined as to what they told police in February, 1984. (22 RT 2500.) Crystal Custodia's memory was impaired.. (22 RT 2503.)

The trial court denied the motion finding that Petitioner failed to demonstrate prejudice from the delay. (22 RT 2516.)

2. The Fifth and Fourteenth Amendments protect an accused from pre-accusation delay that results in the denial of a fair trial. (United States v. Marion (1971) 404 U.S. 307, 324 (1971). In United States v. Barken 412 F.3d 1131 (9th Cir. 2005), the reviewing court set forth the law applicable to a claim of preaccusation delay under the federal constitution:

> "The well-settled test for determining whether a defendant's due process rights have been violated is in two parts. First, 'a defendant must prove that he suffered actual, non-speculative prejudice from the delay,' meaning proof that demonstrates exactly how the loss of evidence or witnesses was prejudicial. (Citations omitted.) The defendant's burden to show actual prejudice is heavy and is rarely met. (Id.) The second part of the test applies only if the defendant has demonstrated actual prejudice. United States Manning, 56 F.3d 1188, 1194 (9th Cir. 1995). In the second part, the delay is weighed against the reasons for it, and the defendant must show that the delay '"offends those fundamental conceptions of justice which lie at the base of our civil and political institutions."' (Citations omitted.) (Also see United States v. Sherlock, 962 F.2d 1349, 1352 (9th Cir. 1989); United States v. Doe, 149 F.3d 945, 948 (9th Cir. 1998).)

To the same effect are United States v. Lovasco 431 U.S. 783, 790 (1977) and United States v. Marion, supra, 404 U.S. at pp. 324-325.[22]

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[22] Although Marion and Lovaso both noted the prosecutorial concession that deliberate delay to disadvantage a defendant would constitute a denial of due process, these cases do not hold that such is required in order to obtain a dismissal on the basis of preaccusation delay. (People v. Boysen , 152 Cal.App.4th 1409, 1422 (2007).) The Boysen court

3. In the instant case, Petitioner was prejudiced in a variety of ways by the 17 year delay in charging him.

Petitioner lost the ability to have the case adjudicated in juvenile court and was thereby subject to far more severe, adult sanctions for the crime. (People v. Chi Ko Wong , 18 Cal.3d 698, 718 (1976).) As observed by the United States Supreme Court, "to transfer a child from the statutory structure of the juvenile court to the criminal process . . .is, indeed, a 'critically important' proceeding." (Kent v. United States, 383 U.S. 541, 560 (1966).)

Further, significant evidence and witnesses were lost by the time of trial. The original 911 call and dispatch tapes were missing. (5 CT 1162.) These tapes would have helped pinpoint the time of the report and aided the jury in determining whether Mr. Bass had removed the drugs from Marlon's room after he discovered the murder of his son as the defense alleged or whether he did so the night before, as Mr. Bass testified. Such evidence would have been critical to proving whether or not the crime occurred during the commission of a burglary and whether or not Petitioner was the perpetrator. The prosecution presented evidence that Petitioner appeared to have more drugs and money after Marlon's death, the implication being he stole these from Marlon. Establishing with

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observed:

> "It is one thing to conclude, as those cases do, that delay for tactical advantage constitutes a violation of due process, it is another to conclude delay for tactical advantage must be shown before a due process violation may be found to exist. We observe in this regard that Marion and Lovasco are entirely consistent with California's balancing test." (152 Cal.App.4th at p. 1422.) The Ninth Circuit employs the balancing test as well. (Barken, supra; United States v. Manning 56 F.3d 1188, 1193 (9th Cir. 1995).)

certainty that Mr. Bass removed the drugs the night before would have negated that Petitioner's increased wealth was due to his commission of the crime.

It was undisputed that tapes of interviews of the Smith brothers were missing. (5 CT 1164.) This evidence was critical because there was a critical and question as to whether they were involved in the commission of the offense based on Wesley's testimony. (22 RT 2547-2552.) Further, the trial court found the Smith brothers had been deliberately evasive and not credible at trial. (22 RT 2499.) The tapes would have assisted the defense in arguing their lack of credibility and the jury in determining their credibility. The loss of physical evidence at the scene, specifically the failure to fingerprint the baseball bat and glass and latch at the front door was prejudicial. (22 RT 2494-2497.) There was no physical evidence otherwise connecting Petitioner to the scene. Fingerprint evidence tying someone else there would have been powerful exonerating evidence.

A traffic ticket that Troy Tibbils claimed he received on the day of a drug transaction between Petitioner and Marlon was lost by the time of trial. The loss of the ticket prevented Petitioner from proving that the drug transaction did not occur on the day of Marlon's death, a critical point since Tibbils was the only witness to link Petitioner to Marlon on that day. (22 RT 2502.)

Documentation proving Wesley's purchase of jewelry for his girlfriend on the day of the killing was unavailable by the time of trial. (10 RT 1267-1268, 22 RT 2503.) Wesley was clearly a suspect during the investigation. He knew Marlon and was seen in the area of Marlon's house on the day of the crime. Further, he had made incriminating statements to a co-worker about the crime and had initially lied as to his whereabouts on the day it occurred. Documentation of a jewelry purchase would either have solidified his alibi or

further implicated him as the perpetrator. This was critical where Petitioner denied committing the offense and Wesley was seen near the Bass house near in time to Marlon's death.

Records pertaining to Danette Edelberg's 1984 domestic violence action against Petitioner were unavailable. These records were critical because Danette asserted that the incident arose out of a discussion of the Bass killing. Her 1984 rendition of what occurred at that time would have either constituted powerful corroborating evidence or severely impeached her trial testimony as to what took place. Petitioner's employment records were unavailable also which would have assisted the defense in establishing his whereabouts on the day of the crime and provided him with a point of reference for that time period.

Other witnesses were lost who would have helped Petitioner buttress his defense that someone else committed the crime. Clearly, prejudice can result from the death of a witness. (Barker v. Wingo 407 U.S. 514, 532 (1972).) Darryl Littlejohn, who was owed $987 by Marlon and had said, "Let's go over and get the Black guy" was dead by the time of trial. (2 RT 155-156; 5 CT 1164, see II, below.) Littlejohn had also talked about a .22 gun. (2 RT 157.) According to the defense, Ricky Ventimiglia, a percipient witness to Littlejohn's threat about Marlon Bass, was missing by the time of trial. (5 CT 1164.) Mitch Helms, who also had sold drugs to Petitioner, was missing at the time of trial. (22 RT 2504, 10 RT 1155.) Given that Petitioner claimed he was not the perpetrator, showing there were others who might have committed the offense was critical defense evidence.

A number of witnesses had lost memories. Sgt. Pitts, one of the original investigating officers, had lost any recollection of the case by the time of trial. (22 RT 2497, 18 RT 2260.) Sgt. Brockman, originally in charge of the investigation, failed to recall a critical discussion with Danette Edelberg about

Petitioner's alleged reenactment of the crime to her in 1984. (22 RT 2498-2499.) Crystal Custodia, who saw Wesley near the Bass residence on the day of the offense, had a failure of recall. (22 RT 2503.) Marlon's father could not recall with any precision when he removed drugs from Marlon's bedroom, the significance of which is discussed above. (22 RT 2503.) Petitioner himself could not recall or corroborate his own doings on the day of the crime. (3 RT 2503.)

5. Most recently, a California reviewing court, applying the balancing test mandated by the United States Supreme Court found that a 24 year delay in charging the defendant with his parent's murder was prejudicial when balanced by the justification for the delay, requiring dismissal of the charges. (People v. Boysen 152 Cal.App.4th 1409 (2007).) The court noted that the passage of time "fades memories, sees the death of important witnesses and often results in the loss of physical evidence," all of which occurred in that case. (Id., at p. 1425.) The same is no less true in the case at bar, as has been described above. In Boysen, the court determined that the most important evidence lost was "that dealing with a possible alibi defense." (Id., at p. 1425.) Two potential alibi witnesses had died. One had supposedly heard a shot the night of the murders and was the first on the scene to observe the victims. The reviewing court concluded:

> "Not only did her death deny the defense the statement about hearing a shot the night of the murders, it denied the defense the ability to develop additional evidence concerning what she heard and the particular circumstances under which she heard it. The police investigation of Naples [the dead witness] was not extensive." (Id., at p. 1425.)

A second witness, deceased at the time of trial, had told police she heard a small car's engine at a particular time on the night of the killings. The court found her death meant that the defense could not interview her concerning the engine sound or her observations as the first person on the scene. (Id., at p. 1426.) The court

also found prejudice from the defense's inability to investigate potential third party culpability evidence, explaining, "While some suggestions of third party culpability evidence in 1980 and 1981 were mere speculation, e.g., the possibility they were killed by drug traffickers, other evidence was more credible and might have been meaningfully investigated by the defense." (Id., at pp. 1426-1427.) Another potential witness relating to third party culpability had died. As to this witness, the court stated, "The inability because of the passage of time to explore Hobbs's possible involvement in the murder of Elsie and Robert was prejudicial to the defense." (Id., at p. 1427.) Notably, the defense made no specific showing of what any such exploration or investigation would have revealed. Finally, the reviewing court cited the trial court's additional finding of prejudice, "The trial court also concluded that the failure of the police in 1980 to fully investigate the murders, document the crime scene, conduct forensic tests and retain important physical evidence, e.g., an open brief case found at the scene, all made investigation of the crime and the development of a defense in 2004 very difficult." (Id., at p. 1427.)

Boysen is significant for the instant case for it sanctions a finding of prejudice without the defense showing absolutely that the lost evidence impacted his defense. In other words, the Boysen court allows a margin of speculation as to what the defense could have done by way of investigation had the evidence been available. It found prejudice where the defendant's ability to develop third party culpability evidence was impacted without requiring a concrete showing that such evidence could absolutely be produced. Thus, to the extent that the California Court of Appeal herein denied Petitioner's claim based on the fact that certain of his assertions of prejudice were speculative, such finding is contrary to Boysen, which applied the balancing test of the U.S. Supreme Court.

6. The prosecution presented no reasonable justification for the 17 year delay. The need to conduct additional investigation may provide such justification. (Jones v. Superior Court, 3 Cal.3d 734, 740-741 (1970).) However, negligence in gathering evidence or assembling a case for presentation to the district attorney or a district attorney's incompetence in evaluating a case for possible prosecution will not justify a long delay which deprives a defendant of his due process right to a fair trial. (Penney v. Superior Court, 28 Cal.App.3d 941, 953 (1972).) As stated in People v. Pellegrino, 86 Cal.App.3d 776, 781, (1978) "'[the] People cannot simply place gathered evidence of insubstantial crimes on the 'back burner' hoping that it will someday simmer into something more prosecutable. . ." In this case, the prosecution had their most critical evidence shortly after the crime was committed. Here, the prosecution offered no explanation to counter defense representations regarding the various stops and starts in the investigation and years of no activity in the case. The trial court at the hearing of Petitioner's motion to dismiss noted, "I know somebody dropped the ball," (5 RT 427), a charge with which the prosecutor agreed. (23 RT 2682.)

In sum, Petitioner's Fifth and Fourteenth Amendment rights to due process were violated by the substantial delay in charging him.

II. PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT GUARANTEES OF DUE PROCESS AND THE RIGHT TO PRESENT A DEFENSE WERE VIOLATED BY THE EXCLUSION OF THIRD PARTY CULPABILITY EVIDENCE.

1. The Sixth and Fourteenth Amendments afford a criminal defendant the right to due process, a fair trial and the right to present a defense. (Chambers v. Mississippi, 410 U.S. 284, 294 (1973); Holmes v. South Carolina, 547 U.S. 319, 324 (2006).)

Facts supporting this claim

2. Petitioner adopts and reincorporates all the facts and other matters set forth elsewhere in this petition.

3. The trial court allowed third party culpability evidence pertaining to Geoffrey Caplan, but excluded such evidence as to Blaine Buscher.. (2 RT 159-160; 17 RT 1983-2014.)

With respect to Buscher, Petitioner presented an offer of proof that a William Wall had spoken to the police in 1984 and told them that at a poker party, he said to Buscher, "You killed the nigger," referring to Marlon. Buscher nodded his head up and down in agreement. Buscher was interviewed by police and denied involvement. (5 CT 1058, 2 RT 145.) Petitioner also proffered that Buscher acknowledged knowing Marlon and another witness said Buscher owned a small handgun. (2 RT 149.) The prosecution proffered that Wall did not know if Buscher understood his reference to be to Marlon's murder and when interviewed by police, Buscher denied ever adopting anyone's suggestion at the card game that he was responsible. (2 RT 145-6, 17 RT 1994-1995.) The prosecutor pointed out that Wall's initial statement, to which Buscher nodded, was ambiguous because they were playing cards with another African American, Billy Baptiste, and Wall's statement was made at 4:30 or 5:00 a.m. after a long night of drinking. (2 RT 145-149, 17 RT 1994-1995, 4 CT 973-974.) The trial court excluded the evidence on the basis that the admission was tenuous and vague given the context of an all night drinking and card party and Buscher and Wall's subsequent denials that Buscher made an admission. (2 RT 154, 160, 17 RT 1993.)

Defense counsel also sought to present the testimony of Kirk Hill, Laura Basolo, Shannon Murphy and Mark Delaney in an attempt to link Buscher to the crime scene. The evening before the murder, at about 7:00 p.m., Hill saw a white male in a green Army fatigue jacket approach the Bass residence and yell at

Marlon. (17 RT 1988-1989.) He did not know the man. (17 RT 1989.) Laura Basolo was in the Bass neighborhood at 11:00 a.m. on the day of the murder. She placed a leaflet on the Bass front door and saw nothing wrong with the front window. When she left the area, she saw a male, around 6 feet tall, wearing a green Army fatigue jacket at the Bass front door. (17 RT 1987.) On the evening of the murder, Shannon Murphy, who lived near the Bass's, saw a man in a green Army fatigue jacket, who appeared to be under the influence of something or bothered by something. (17 RT 1991-1996.) Delaney had information that Buscher was known to wear an Army field jacket at the time of the murder. (17 RT 1992.) Petitioner argued that the man seen by Hill, Basolo and Murphy could have been Buscher, thus their testimony would circumstantially connect him to Marlon's house before, around the time of and after the murder, thus providing evidence that he did the crime, not Petitioner. (17 RT 1991-1992.) The trial court declined to allow all of this evidence to be admitted on the basis that it was not relevant and not sufficient to qualify as third party culpability evidence in that it was too tenuous and vague. (17 RT 1998.)

4. In Chia v. Cambra 360 F.3d 997 (9th Cir. 2004), the Ninth Circuit explained:

> "It is clearly established federal law, as determined by the Supreme Court, that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation. Chambers, 410 U.S. at 302, 93 S.Ct. 1038. . .
>
> '[T]he Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'" (Citation omitted.) . . . .
>
> In a habeas proceeding, we have traditionally applied a balancing test to determine whether the exclusion of evidence in the trial court violated a petitioner's due process rights, weighing the importance of the evidence against the state's interest in exclusion. (Citation omitted.) In balancing

> these interests, we must, on the one hand, afford 'due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, and in excluding unreliable . . . evidence.' (Citation omitted.) On the other hand, we must stand vigilant guard over the principle '[t]he right to present a defense is fundamental' in our system of constitutional jurisprudence. (Citation omitted.). . .In light of these competing interests, federal habeas courts must 'determine what weight the various interests carry when placed on the scales,' (Citation omitted) and ultimately determine whether the decision of the state court to exclude the evidence in question was reasonable or unreasonable.. . .In assessing the interests at issue in this case, we invoke the five part balancing test formulated in Miller. These factors include: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense.' Miller 757 F.2d at 994."

5. Application of the balancing test as described in Chia compels the conclusion that the trial court unreasonably excluded third party evidence in the case at bar. The probative value of the excluded evidence was great in terms of Petitioner's denial of culpability. "Self-inculpatory statements have long been recognized as bearing a strong indicia of reliability." (Chia, supra, 360 F.3d at p. 1004-1005, citing Williamson v. United States, 512 U.S. 594, 599 (1994) ["[R]easonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true."].) Here, a named person, Buscher, who knew Marlon, made an incriminating admission about the killing. The fact that Buscher denied having done so, that Wall did not think he intended to accept responsibility for the killing, and the admission took place in the context of an all night drinking and card playing party was not a principled basis upon which to exclude it and did not detract from its reliability. In People v. Cudjo, 6 Cal.4th 585 (1993), the California Supreme Court found the exclusion of a third party's confession to be error. The defendant's brother confessed to a cell mate that he had in fact committed the murder for

which the defendant was on trial. The court excluded the testimony on the basis that it was unreliable hearsay, and its probative value was outweighed by its prejudice. (Id., at pp. 605-606.) The state high court found error in such exclusion because doubts about the credibility of the witness should be left to the jury and the evidence had substantial probative value, and the evidence need only be capable of raising a reasonable doubt of guilt. (Id., pp. 609-610.) The evidence excluded here is comparable to that erroneously excluded in Cudjo. There, the third party confessed to the crime, here he made an inculpatory admission and other erroneously excluded evidence circumstantially placing him in the area during the relevant time period buttressed that admission. Per Cudjo, it was not up to the trial court to refuse it based on credibility concerns.

6. The refusal of the trial court to admit the third party culpability evidence described above violated Petitioner's Sixth and Fourteenth Amendment rights to due process and to present a defense under any standard this Court might find applicable, mandating reversal. E.g., Respondent cannot prove that the constitutional error was harmless beyond a reasonable doubt per Chapman v. California (1967) 386 U.S. 18, 24. Alternatively, the error had a substantial and injurious effect on the jury's verdict, requiring reversal. (Brecht v. Abrahamson 507 U.S. 619, 623 (1993).) The inquiry is not merely whether there was enough evidence to support the verdict, but whether the error itself had substantial influence. (Id., at p. 637.) Here, the excluded evidence went to the centrality of the case, the heart of Petitioner's defense that he was not the perpetrator. (Cf. DePetris v. Kuykendall 239 F.3d 1057, 1065 (9th Cir. 2001) [erroneous exclusion of defense testimony about victim's handwritten journal could not be deemed harmless because "preclusion of this highly probative evidence went to the crux of the case, and the harm caused by its exclusion was not cured by the receipt of other

evidence that was significantly less compelling."].) In addition, upon critical analysis it is clear that the strength of the evidence of Petitioner's guilt was not overwhelming, a factor that Brecht teaches may be considered in determining whether or not a jury was substantially influenced. (Brecht, supra, 507 U.S. at p. 639.) Michael Leon's statement concerning Petitioner's alleged admission to him that he committed the crime in self-defense was weakened by the fact that he had been drinking just before he talked to the police and the defense asserted the statement was coerced.

Edelberg's testimony regarding Petitioner's admissions/reenactment was not strong evidence of his guilt. Her testimony was rife with inconsistencies as to when the reenactment took place, how Petitioner reenacted the crime, and when Edelberg informed law enforcement of it. Further, she admitted lying to the police. Her testimony conflicted with that of her friend, Danielle Fournier as to how Petitioner reenacted the crime and whether or not Danielle picked Edelberg up or she left his house in her own car. Both Danette and her brother had a reason to be biased against Petitioner because of his alleged physical and emotional abuse of them. Danette and Shelby's testimony differed as to whether or not Danette told Shelby about the alleged reenactment. Further, Shelby never disclosed Petitioner's supposed admissions until shortly before his testimony. As for Bernard Wesley, his testimony was filled with contradictory statements and was inconsistent with other witnesses. In addition, he had been a suspect in the case as he was seen near the Bass residence on the day of the crime and thus had a bias toward incriminating Petitioner. He gave the police inconsistent alibis and his girlfriend did not corroborate his story of giving her jewelry on the day in question. He admitted the crime to a co-worker although he claimed to be joking. Even the prosecution admitted that Wesley was not a good witness. (22 RT 2545.) The

Smith brothers, who in 1984 told police that Petitioner had asked their help in collecting a drug debt were obvious liars and indeed, the trial court found them not credible. (22 RT 2499.) They claimed to have no relationship with Petitioner and claimed not to know Bernard Wesley despite the fact that Wesley identified them as possibly involved and they had backed Petitioner up when he collected a drug debt from Wesley.

Other evidence relied upon by the People to establish Petitioner's guilt was equivocal. No physical evidence connected him to the crime. No one saw him at the Bass house on the day of the crime. His former girlfriend Mary Keasling did not incriminate him. The case against him rested entirely on the statements of various witnesses made years after the fact. Although the prosecution pointed to the fact that Petitioner appeared to have money after the crime, there was evidence that he was employed at the time, plus had received funds from the sale of his car and an insurance settlement. Although there was evidence that he had been seen with a gun, as it turned out, this was not at the time of the killing and moreover was not shown to be the type of weapon used to kill Bass. The prosecution relied on the fact that Petitioner appeared to know facts about the killing that had not been released to the public. The defense presented evidence that such facts had not been kept secret. The prosecution argued that Petitioner's allegedly abrupt departure from the San Jose area was evidence of his guilt. Yet the defense presented evidence that said departure was planned as Petitioner had to obtain advance permission from the court to change the location of his then probation.

In sum, the wrongful exclusion of third party culpability evidence requires reversal.

III. PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO JURY TRIAL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS DUE TO THE TRIAL COURT'S ERRONEOUS DISMISSAL OF A JUROR DURING DELIBERATIONS.

1. Petitioner had a Sixth Amendment right to jury trial and a Fourteenth Amendment right to due process and a fair trial. A defendant's Sixth Amendment right to a fair trial is violated when the "essential feature" of the jury is not preserved. (Williams v. Florida 399 U.S. 78, 100 (1970.) California Penal Code section 1089 allows removal of a juror from service before or after submission of the case if the juror becomes ill, dies, or upon other "good cause." The constitutionality of said statute has been upheld. (Miller v. Stagner, 757 F.2d 988, 995 and fn. 3 (9th Cir. 1985).) Petitioner contends that the trial court's removal of Juror 6 during deliberations and substitution of an alternate over strong defense objection was in violation of his Sixth and Fourteenth Amendment rights. The Sixth Amendment right at issue encompasses the improper removal of a juror. (Id., at p. 995.)

2. Petitioner adopts and reincorporates all the facts and other matters set forth elsewhere in this petition.

3. During voir dire every juror was asked about "good" and "bad" experiences with the police. (1 ART 88-89, 123, 135, 148, 159, 164, 177.) They were asked if they knew anyone who had been criminally accused. (1 ART 96-97.) There were questions about police lying (1 ART 89-94), and each juror was asked if there was any reason they might be biased or not fair. (1 ART 25, 28, 30, 32, 33, 34-38, 76-77, 83, 113, 128-129, 177, 189.) Juror 6 was not part of the 12 prospective jurors in the box at that time. (2 ART 174.) Juror 6 was called for questioning partway through the second day of voir dire. (2 ART 174.) He indicated he had a first cousin who was a policeman. (2 ART 174.) That

relationship would not make it difficult for him to be fair. When asked if the crime of murder with gun use had "ever touched your life" so that his impartiality would be in question, he said no. (2 ART 175.) He could not think of any reason why he could not be fair. The prosecutor asked him, "When I asked the earlier question about particularly good or bad experiences with law enforcement, about the victim's background, dealing drugs, and the other questions about being able to weigh the evidence at the end of trial, any questions that were outstanding, is there anything that came to mind?" (2 ART 177.) Juror 6 said no, and when the prosecutor followed up with, "Nothing at all?"again said no. (2 ART 177.)

During deliberations, seven jurors sent a note to the court stating that Juror 6 was biased against police officers, thought all the witnesses had lied and had mentioned an incident where a young friend of his had been shot. The note further stated that "We feel he may have misrepresented himself during jury selection" and asked for the court's advice. (24 RT 2722-2723.) The court informed both counsel of the note and obtained briefing from both parties as to a proposed course of action. (24 RT 2723, 7 CT 1641-1657.) Over defense objection, the court determined it would conduct an investigation because of the possibility that "personal experience" had not been disclosed. (24 RT 2725, 2730.)

The court informed Juror 6 of the contents of the other jurors' note. (24 RT 2731.) The court asked Juror 6 if his answer was still "No problem" to the question he had been asked in voir dire, "When I asked the earlier questions about particularly good or bad experiences with law enforcement, about the victim's background, dealing drugs and the other questions about being able to weigh the evidence at the end of the trial." (24 RT 2733.) He denied that he had during deliberations expressed a negative bias toward police officers and that he had personal experience with violence and guns. (24 RT 2731.) He stated, "I

expressed that I felt that the investigators didn't do a good enough job to prove it, to prove to me beyond a reasonable doubt." (24 RT 2731.) Juror 6 denied any negative experience with the police in the past. (24 RT 2732.)

The court interviewed the other jurors. Juror 1 said Juror 6 was an angry man and the other jurors did not know the police like he did. He had seen a friend shot in the stomach when he was 13. (24 RT 2734.) The other jurors did not grow up in the same neighborhood as he did and the police were trained to mislead or lie. Juror 6 was not refusing to deliberate. (24 RT 2734, 2736.) Juror 2 refused to sign the note because he/she did not think things were going badly but he/she was disturbed about Juror 6's reference to the shooting when he was 13 because he/she did not think that came out during voir dire. (24 RT 2737.) Juror 3 said, "[Juror 6] basically said they are all trained to lie and he's had some bad experiences with a friend being shot in the stomach. . .I just feel like he brought this bias with him into this trial and he should never have been a juror." (24 RT 2738.) Juror 4 said, "[Juror 6]' made a couple of inferences about you don't understand. You haven't seen the things I've seen throughout my lifetime. You haven't seen the way the police act. . .he said as far as I'm concerned all police are trained liars." (24 RT 2739.) Juror 5 said Juror 6 said he "didn't believe anything that police said and "he didn't believe any of the witnesses." Juror 6 also said "he had a lot of experience with police" and "none of the jurors were going to change his mind." (24 RT 2740.) Juror 5 felt Juror 6 was biased. (24 RT 2740.) Juror 7 denied that Juror 6 said anything negative about police officers in the jury room. Juror 6 had mentioned his problems with police to Juror 7 and the foreman while they were outside on a break. (24 RT 2741.) Juror 8 said Juror 6 had said he was raised in a tough part of San Jose where there were shootings and stabbings. (24 RT 2742.) He/she believed Juror 6 was "in the process of reasoning." (24 RT

2743.) Juror 9 said that Juror 6 had said the police were dishonest and liars and, "you can't believe anything that anyone tells you." Juror 6 answered yes when asked if he had had bad experiences in the past. (24 RT 2743.) Juror 10 did not see any problems with how Juror 6 had conducted himself. (24 RT 2745.) Juror 11 said Juror 6 said that all police are liars, he grew up with them in his neighborhood, that one of his friends had been shot in the stomach and he had problems with guns. (24 RT 2745.) This juror opined that Juror 6 was not working with them at all. (24 RT 2746.) Juror 12 said Juror 6 was "very negative on the law enforcement" and mentioned when he was younger one of his friends had been shot. He did not actually say a police officer had done it. (24 RT 2747.)

The court then questioned Juror 6 again. (24 RT 2747.) Juror 6 denied making any statement about a young friend being shot in the stomach. (24 RT 2748.) He admitted stating that the other jurors had not been raised in his type of neighborhood. He was trying to explain that police can make mistakes and lie. (24 RT 2748.) He opined the other jurors were angry with him because he was not coming to an immediate conclusion and one juror was supposed to go on vacation that week and another had to go to a wedding. He felt "it was already eleven to one and I was the only one." (24 RT 2749.) He acknowledged that he had been to court several times on criminal matters but this had not caused him to become hostile toward police because, "I felt anything I did in the past was my mistake and whatever consequences that happened to me was because of what I did." (24 RT 2749-2750.)

The court expressed concern about the narrow issue of whether Juror 6 had been truthful when he said he could be fair and impartial. (24 RT 2754.) The prosecutor noted that had the juror not concealed his criminal record and negative bias toward police he could have excluded for cause and he should be

now. (24 RT 2757.) Defense counsel reiterated his strong objection to any decision to remove Juror 6. (24 RT 2757.) The court dismissed the juror, finding he had committed misconduct by lack of truthfulness during voir dire, concealing his bias at that time. The court found he lacked credibility and disbelieved his denial that he had not seen a 13 year old friend shot, stating other jurors would not make that up. The court also found there was a demonstrable reality that Juror 6 had lied under oath and was not truthful regarding his bias against police officers. (24 RT 2759-2760.) Before ruling the court marked as an exhibit Juror 6's criminal history reflecting 29 bookings and ordered it sealed and not unsealed unless by the Court of Appeal. (24 RT 2759.) The court also marked as an exhibit the transcript of the voir dire of Juror 6, which was also ordered sealed. (24 RT 2761.)

Trial counsel raised the issue of Juror 6's dismissal in a motion for new trial. (7 CT 1711-1723.) He attached a declaration from Juror 6. (7 CT 1776-1780.) In said declaration, Juror 6 again denied recounting to other jurors the shooting of a 13 year old although he may have made passing reference to the fact that there had been shootings by police officers. (7 CT 1778-1779.) He acknowledged that he had had many contacts with the police in the past, but any negative experiences he had had with them were well in the past. Whatever had happened to him in the past was his mistake and because of his youth. He further stated he did not believe he lied during voir dire and he was not biased. His statements in the jury room were "with regard to the case that I heard, not with any bias." (7 CT 1780.)

The trial court ruled Juror 6's declaration was hearsay and stated he had not been credible at the time of the hearing nor in the declaration. (26 RT 2794-2795.) The court denied the new trial motion. (26 RT 2811.)

4. The Court of Appeal, the last reasoned decision on the matter, found that the testimony of the other jurors supported the trial court's finding that Juror 6 lacked credibility, had lied during voir dire about not having a negative police bias that would impede his ability to be fair and impartial, and lied again to the court about not making certain statements during deliberations. (Exhibit A, p. 34.)[23] The California Court rejected Petitioner's contention that Juror 6's statements merely reflected his personal experience and found that "his statement that he thought all police were dishonest and trained to lie reflects actual bias and an inability to be fair and impartial that is sufficient by itself to support a discharge." (Exhibit A, p. 34.) "Because on habeas review a trial court's findings regarding juror fitness are entitled to special deference, review is for manifest error." (Perez v. Marshall, 119 F.3d 1422, 1426 (9th Cir. 1997).) As stated in Sanders v. Lamarque, 357 F.3d 943, 948 (9th Cir. 2004), "the state court's factual findings are entitled to a presumption of correctness unless the petitioner can prove otherwise by clear and convincing evidence."

5. Under Penal Code section 1089, a court may remove a juror for good cause if it finds a "demonstrable reality" that the juror is unable to perform his duty, i.e. deliberate fairly. (People v. Cleveland, 25 Cal.4th 466, 474 (2001).) If the trial court finds that the juror harbors an actual bias which was concealed on voir dire, there will be good cause to remove the juror. (People v. Keenan, 46 Cal.3d 478, 532 (1988).) "Specifically, a bias against law enforcement officers that renders a juror unable to fairly weigh police testimony is grounds for the

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[23] As the last reasoned decision on the matter, it is this opinion that must be reviewed by this Court. (Shackleford v. Hubbard, 234 F.3d 1072, 1079, n. 2 (9th Cir. 2000).)

juror's replacement." (People v. Barnwell, 41 Cal.4th 1038, 1051 (2007), citing People v. Thomas, 218 Cal.App.3d 1477, 1485 (1990) and People v. Feagin, 34 Cal.App.4th 1427, 1437 (1995).) Barnwell counsels that:

> "A distinction must be made, of course, between a juror who cannot fairly deliberate because of bias and one who, in good faith, disagrees with the others and holds his or her ground. 'The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not ground for discharge.. . .A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views.' (Citation omitted.)"
>
> "Removing a juror is, of course, a serious matter, implicating the constitutional protections defendant invokes. While a trial court has broad discretion to remove a juror for cause, it should exercise that discretion with great care." (Barnwell, 41 Cal.4th at p. 1052-1053.)

6. The trial court's finding, adopted by the California Court of Appeal that Juror 6's comments that police were dishonest, that he had grown up in a tough neighborhood and one of his friends had been shot in the stomach constituted actual and impermissible bias against law enforcement that would render him unable to be fair and impartial was not supported by clear and convincing evidence.

First, several jurors had expressed the belief that Juror 6 had negative bias against the police, one recalled that Juror 6 thought all police officers were liars while two indicated he had commented that police officers are trained to lie. Some thought Juror 6 had strong opinions but was deliberating properly. (24 RT 2734, 2738, 2739, 2743, 2743, 2745.) A comment that police were trained to lie was within the bounds of the evidence presented at trial. Detective Vissuzi testified that officers received training in lying to witnesses. In trial counsel's motion for new trial, he stated:

> "Vissuzi employed a number of tactics to persuade witnesses to say certain things, including misrepresenting himself (as a parole officer) and splicing specific portions of David Leon's previous statement to the police out of context onto tapes and then specifically stating to witnesses that they meant something other than the meaning that was given to them by the defendant. One extreme example of this was the use of such a tape-splicing method with the defendant's father, Mr. Michael Leon." (7 CT 1721.)

Given that only one juror remembered that Juror 6 had said all police officers are liars, and given Detective Vissuzi's admission that police receive training in lying to witnesses, coupled with what occurred in this case as quoted from defense counsel's new trial motion, there was insufficient evidence to support a finding of actual bias against all police officers, regardless of the circumstances, which would amount to actual and disqualifying bias. (People v. Thomas, supra, 218 Cal.App.3d 1482-1483.)

Second, Juror 6 was permitted to bring his personal experience to bear in reaching a decision. (People v. Fauber, 2 Cal.4th 792, 838-839 (1992); People v. Franklin, 56 Cal.App.3d 18 (1976).) In Franklin, during deliberations a juror revealed she wanted to disqualify herself because she had once been drugged at a party and had "run amuck" for three days with lapses in memory, an experience akin to the defense testimony related to diminished capacity. (Id., at p. 24-25.) She felt she could not be fair and impartial. However, upon further questioning by the court and counsel, she stated she could shut out of her mind her own personal experiences. The reviewing court upheld the trial court's determination to retain her as a juror:

> "From the record it appears that Mrs. Allen's comments clearly do not reach the required standard of an inability to perform the functions of a juror. She appeared intelligently sensitive to the effect that her personal experience would have on the case, and indicated her desire to serve and render a fair decision. With such statements on the record, the court's discretion was extremely diminished to justify the disqualification of Mrs.

Allen under sections 1089 and 1120." (Id., at p. 26.)

Here, Juror 6 was clear that he denied a negative police bias and admitted that his extensive police contacts did not cause him to be biased because they were his own fault, not that of law enforcement. (24 RT 2749-2750.) As in Franklin, in making the comments to other jurors during deliberations, Juror 6 was simply relating his personal experience to the matter at hand.

Third, the record did not demonstrate any such bias as a demonstrable reality. Petitioner acknowledges two California Court of Appeal decisions which have held that a juror's bias against police is good cause to discharge him or her and that the trial court may properly rely on the accounts of other jurors to corroborate that bias in the face of the offending juror's claim that he harbors no such bias. (People v. Thomas, supra, 218 Cal.App.3d at pp. 1484-1485; People v. Feagin, supra, 34 Cal.App.4th at pp. 1434-1437.) However, neither of these cases expressly involved a situation where the vote was 11 to 1 for guilt with the allegedly biased juror being the holdout juror and consequently the conclusion that there was actual bias justifying discharge did not take into account that factor and how it might have influenced the other jurors in making the accusations they made against Juror 6. In the instant matter, as summarized above, it was clear that Juror 6 was the lone holdout. When questioned by the court, Juror 6 said it was already 11 to 1 with him being the one, and other jurors were irritated with him because he was not coming to an immediate decision and two of them had social and vacation plans that they did not want interrupted. (24 RT 2749-2750.) The trial court did not accord proper significance to this factor nor did it so much as question any jurors in this vein to substantiate Juror 6's claim. In earlier questioning, Juror 6 had indicated his feeling came from the specific investigation in this case and it would not prevent him from being fair and impartial. (24 RT

2731-2733.) He also maintained that his many arrests did not engender this feeling, that his past was his mistake and whatever consequences he suffered were because of what he himself did. (24 RT 2749-2750.) The trial court failed to afford proper weight to these statements in light of the fact that Juror 6 was the lone holdout with other jurors angry at him.

7. Juror 6 did not intentionally conceal a negative bias toward law enforcement during voir dire which would support his discharge. During voir dire, Juror 6 revealed he had a cousin in law enforcement, but this would not impact his ability to be fair. He could think of no reason why he couldn't be fair. (2 ART 174-175.) He felt "strongly" about holding the prosecution to their burden of proof beyond a reasonable doubt "because it's their job to prove." (2 ART 176.) When asked by the prosecutor, "When I asked the earlier questions about particularly good or bad experiences with law enforcement, about the victim's background, dealing drugs, and the other questions about being able to weigh the evidence at the end of trial, any questions that were outstanding, is there anything that came to mind?", Juror 6 said no. (2 ART 177.) Taking away the garbled syntax of the question which was compound and vague, the prosecutor was essentially asking the juror if he had had any bad experiences with police. While he had suffered numerous arrests, Juror 6 said no. He subsequently explained this answer, when questioned during deliberations, by stating that, essentially, he had gotten what he deserved. Notably, although during the process of determining whether or not to discharge Juror 6 the trial court had before it the record of the juror's numerous arrests, the court did not ask him a single question about them to determine if there were circumstances about them that would have caused him to harbor negative feelings about the police.

The trial court found Juror 6 lacked credibility when he stated during

voir dire he could be fair and impartial based on his denial that he had witnessed a thirteen year old friend being shot, something reported by certain of the other jurors. (24 RT 2759, 2748.) However, the trial court's decision in this regard, and thus the California reviewing court's, was not supported by clear and convincing evidence that Juror 6 lied about this, thus providing a basis for rejecting his credibility. When Juror 6 denied having made any statements about at age 13 seeing a friend shot, the trial court stated, "ten people told me that." (24 RT 2748.) In fact, that was not the case. Juror 1 testified that Juror 6 said he saw a friend shot in the stomach when he was 13. (24 RT 2734.) Juror 2 said Juror 6 saw his first shooting when he was 13 years old. (24 RT 2737.) Juror 3 said Juror 6 claimed a friend had been shot in the stomach. (24 RT 2738.) Juror 8 said Juror 6 said he was raised in a rough part of town where there where shootings and stabbings. (24 RT 2742.) Juror 12 stated that Juror 6 had said that one of his friends had been shot. (24 RT 2747.) Thus, only two juror, not ten, claimed that Juror 6 had said something about a friend being shot in the stomach, and only one juror claimed that it was a thirteen year old that had been shot. Per Juror 12, Juror 6 did not say that a police officer had done the shooting.

At worst, Juror 6 was not completely forthcoming during voir dire. Sanders v. Lamarque 357 F.3d 943 (9th Cir. 2004) is instructive as to whether or not this compelled his dismissal. Sanders involved the removal of the lone holdout juror after the jury foreperson sent the trial court a note complaining that Juror 4 was not following the court's instruction not to be influenced by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The court questioned each juror individually and it became clear that the vote was 11 to 1 with Juror 4 being the one. Juror 4 testified she had been deliberating, felt "deeply" that she was fair and objective, that she had requested the jury analyze

the testimony witness by witness but she felt pressured. The court determined she need not be removed for failure to deliberate or bias. (Id., at p. 946.)

During the hearing, an issue arose as to whether or not Juror 4 had been truthful during voir dire. She had disclosed her grandnephew had been the victim of a possibly gang related murder but had not revealed that she had lived 25 years ago in an area about 20 blocks from where the current crime took place, even though she had not been back in years, and that her sons had associated with gangs when they were teens (they were now 40 and 34 years old). (Id., at p. 947.) The trial court ordered her removed because "she did fail to disclose. . .that her sons claimed gang affiliation and she lived in a neighborhood where apparently there was. . .gang activity going on." (Id., at p. 947.)

The Ninth Circuit reversed the conviction, stating:

> "When establishing juror bias, 'a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.'(Citation omitted.)" (Id., at p. 948.)

Significantly, the court determined the nature of the questions was critical to a determination of whether there was a failure to disclose:

> "The trial court's conclusion that 'she did fail to disclose. . . that her sons claimed gang affiliation, and she lived in a neighborhood where apparently there was. . .gang activity going on' is simply and objectively incorrect. Juror 4 answered questions about her sons' activities in detail and did not, in fact, live 'in a neighborhood in some proximity to the crime scene, but that was not the question posed to her. As explained by the district court, not only was Juror 4's interpretation of the questions on voir dire reasonable, but an independent review of the record demonstrates that, by all measures, it was the correct one. All of the questions posed by the trial court relating to familiarity with the neighborhood were couched in the present tense. Whereas the trial court elected to inquire whether jurors expressly had present and past encounters with particular experiences such as visiting a jail, being a victim of

> crime, being accused of a crime, the knowledge of the neighborhood expressly was conditioned on the juror's present-day residence, work, or other reason that brought her into that neighborhood on a regular basis.
>
> Likewise, all of the questions relating to gangs were specific questions about gang membership, academic expertise about gangs, and whether anyone presently lives or works in an area with a known gang presence. These questions expressly asked about discrete and particular contacts with gangs and are not open-ended queries into all possible contacts with gangs or gang members. In light of this record, any claim of implied bias becomes untenable." (Id., at p. 949.)

On this basis the Ninth Circuit upheld the district court's determination that there was clear and convincing evidence that the state trial court made an objectively unreasonable determination of the relevant facts.

Here, as noted above, the question at issue was extremely vague, broad and compound. The juror answered truthfully, as he apparently did not perceive his prior arrests to be particularly good or bad. Similarly, in People v. Jackson, 168 Cal.App.3d 700 (1985), a case involving possession of marijuana for sale, a broad catch-all question was posed during voir dire to the effect did anyone have anything in their background to disclose, a skeleton in the closet type issue. (Id., at p. 702.) Not until deliberations did a juror disclose that his nephew had died from drug related reasons many years prior to trial. On appeal, the defense claimed the juror should have been discharged. The reviewing court disagreed, concluding that the question had been inartfully framed. The juror had informed the court that his decision would not be affected, which the reviewing court determined supported a finding that the juror was not biased. (Id., at p. 705-706.) The same factors obtain in the case at bar.

8. The erroneous dismissal of Juror 6 violated Petitioner's Sixth and Fourteenth Amendment rights to due process and fair trial under any standard of review this Court might find applicable, mandating reversal. E.g., Respondent

cannot prove that the constitutional error at issue was harmless beyond a reasonable doubt per Chapman v. California, supra (see Joubert v. Hopkins 75 F.3d 1232, 1245 (8th Cir. 1996) [in federal habeas review of state court error, Chapman is applied to constitutional errors when underlying state court opinion failed to apply Chapman analysis in the first instance]; see p. 34 of California Court of Appeal opinion dated 2/24/06, Exhibit A) and the wrongful dismissal had a substantial and injurious effect on the jury's verdict requiring reversal. (Brecht v. Abrahamson, supra. Juror 6 was the lone holdout. Petitioner was convicted shortly after an alternate was substituted. From that we glean that had there been no substitution, Petitioner's jury would have hung.

IV. PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

1. Petitioner had a Sixth Amendment right to effective counsel on appeal. (Evitts v. Lucey, 469 U.S. 387 (1985).) In order to find counsel was ineffective, the test set forth in Strickland v. Washington, 466 U.S. 668, 687-8 (1984) requires a showing that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's error, a different result would have been reached. The Strickland test applies to appellate counsel. (Smith v. Robbins, 528 U.S. 259, 285 (2000).) To establish constitutionally deficient representation on appeal, the defendant must show that (1) the act or omission in question was objectively unreasonable, and (2) there is a reasonable probability that but for counsel's error, the defendant would have prevailed on appeal. (Id., at p. 285.)

2. Petitioner adopts and reincorporates all the facts and other maters set forth elsewhere in this petition.

3. Appellate counsel had a duty to present a brief to the reviewing

court that among other things, sets forth all arguable issues, meaning one that is not frivolous. (Smith v. Robbins, supra, 528 U.S. at p. 282.) As explained in People v. Johnson, 123 Cal.App.3d 106, 109, 112 (1981):

> ". . .an arguable issue consists of two elements. First, the issue must be one which, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the Petitioner, the result will either be a reversal or a modification of the judgment."

Further, "counsel serves both the court and his client by advocating changes in the law if argument can be made supporting change." (People v. Feggans, 67 Cal.2d 444, 447-448 (1967).)

4. Appellate counsel was ineffective in failing to raise on direct appeal the issue of the trial court's refusal to allow the defense to present the testimony of Dr. Ofshe or Dr. Leo, experts on the subject of police coerced statements by witnesses.

5. At Petitioner's trial, defense counsel made repeated attempts to induce the court to allow him to present the testimony of an expert, Dr. Richard Ofshe. The purpose of the testimony was to show that the statement Petitioner's father gave to the police in which he admitted that Petitioner had informed him the murder was committed in self-defense was coerced as a result of police tactics. Petitioner unsuccessfully sought to exclude the statement of his father on this basis. (4 CT 984-985.) When Dr. Ofshe proved to be unavailable, defense counsel sought permission to present the same type of testimony through Dr. Ofshe's colleague, Dr. Richard Leo. (5 CT 1172-1174.) Defense counsel argued that the purpose of Dr. Ofshe's testimony was not to establish the credibility of a witness but rather to show the subtle and not obvious ways a statement can be coerced. Defense counsel

argued:

> "We submit that the statement by Mr. Leon [Petitioner's father] was the product of police coercion, specifically putting Mr. Leon in a position where he was coerced into stating that his son said to him that 'it was self-defense.' The evidence will show that Mr. Leon stated numerous times that his son did not tell him anything about the murder other than he had been a suspect. It was only when the police make statements to Mr. Leon that if he told them that his son said it was in self-defense they could go to the District Attorney and see that his son was freed from custody. The police also went on to tell the father that they had been to the crime scene and that the crime scene corroborated that self-defense was a viable conclusion. All they needed to hear was corroboration. The police even went the extent of playing a tape for the father using an excerpt lifted from the defendant's earlier statement to the police and implying that from this snippet that his son said he killed Marlon Bass in self-defense. This was not only untrue but furnished the basis for the father to believe that the police were telling him the truth. The police also threatened the father that if he did not tell him what they want to hear he would be 'charged with something' and that he could be 'an accessory' to the murder. It was only after the police preyed upon him for approximately one hour that he finally corroborated what he believes they told him existed, e.g. that they have been to the crime scene and if he just told the police his son mentioned that it was in self-defense it will result in his son's 'life' and 'his son's freedom.' 'Now is the time to get it out so we can go to the DA before he is even charged and tell the DA that this is what he told us. . .' All of these ploys can be demonstrated to produce unreliable and coerced responses. This is especially true where Mr. Leon who had consumed approximately two six packs of beer at the time. This coerced statement goes to the very core of the prosecution's case. There is a substantial nexus between the way the interview was conducted and the statement that was finally elicited from Mr. Leon's father. The prosecution's attempt to mask this as a credibility question is an attempt to obfuscate the evidence." (5 CT 1088-1089.)

After listening to the tape of Michael Leon's statement, the trial court ruled that "you [meaning defense counsel] do not need an expert to tell me that this tape was a statement by someone who was coerced or not coerced." (3 RT 281.) The court made a finding that Mr. Leon's statement was voluntary without hint of coercion and whatever tactics were used by the police were permissible under California law. The court then excluded expert testimony as it would not assist the

jury "because there's something of common experience that juries have in regarding the credibility of people under the circumstances under which they are given." (3 RT 283, 287.)

Petitioner sought reconsideration of this ruling. (3 RT 377.) Defense counsel cited various cases to the court and acknowledged that the trial court had found Mr. Leon's statement voluntary but objected to the trial court's blanket exclusion of expert testimony to educate the jury as to general principles concerning police interrogation. Defense counsel noted that the techniques could not be readily recognized by jurors, jurors did not know that police were necessarily specifically trained in how to interrogate witnesses, that these techniques were designed to cause someone to make a statement against their self-interest, and that it was counter intuitive for a juror to believe a person would make a false statement and come to court to testify that it was false. (3 RT 384-385.) Counsel restated the coercive tactics inherent in the police handling of Mr. Leon. (3 RT 386-387.)

The trial court ruled that the issue was not false confession but rather of the credibility of a witness and "expert witnesses are not necessary to assist the trier of fact in determining credibility." (3 RT 393.) The court noted on cross-examination of Michael Leon, counsel could elicit various factors and argue to the jury about what value and weight they should accord his statement. (3 RT 393.) The court denied Petitioner's request to reconsider its earlier ruling. (3 RT 394.)

Petitioner raised the issue again unsuccessfully in a motion for new trial. (7 CT 1727-1728.)[24]

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[24] Dr. Leo was essentially a substitute for Dr. Ofshe whose schedule apparently did not permit him to be a witness at the time counsel needed him. (2 RT 195.)

6. Counsel on direct appeal should have briefed the issue of the trial court's exclusion of the above-described testimony.

Here, as outlined above, defense counsel sought to present the testimony of Drs. Ofshe or Leo to attest to the factors that would cause Michael Leon to make a false statement to the police, a statement which was incredibly damaging to Petitioner and a key component of the evidentiary puzzle against him. As set forth above, defense counsel was clear that the testimony would be in the form of general education of the jury as to police interrogation techniques, interview training and why a person would make a false statement to the police, and would not cross into the arena of commentary on witness credibility.

At the time appellate counsel filed the opening brief, there was one published California decision disallowing the testimony of Dr. Ofshe. This was People v. Son, 79 Cal.App.4th 224, 240-241 (2000), a decision from the Fourth District Court of Appeal. In that case:

> "Son asserted Ofshe could testify about police tactics in wearing down suspects into making false admissions. The court declined to admit Ofshe's testimony. The court stated such expert testimony was unnecessary in light of Son's testimony that he had confessed falsely due to Detective Gallivan's asserted offer of not more than one year in custody. The court also stated there was no evidence that police engaged in tactics wearing down Son into making false admissions." (Id., at p. 241.)

The court found the exclusion of Dr. Ofshe's testimony as irrelevant was proper due to the lack of evidence of coercive tactics coupled with the defendant's admission that he confessed only because of the promise of not more than one year in custody. (Id., at p. 241.) At that time, there were cases from other jurisdictions also disallowing Dr. Ofshe's testimony on false confessions. (See e.g., Kansas v. Cobb, 43 P.3d 855 (Kan.Ct.App.2002); State v. Davis, 32 S.W.3d 603 (2000); New

Jersey v. Free, 798 A.2d 83 (2002).)[25]

On the other hand, at the time Petitioner's opening brief was filed there was a published California case as well as cases from other jurisdictions authorizing the admission of the type of evidence sought to be admitted here, in some cases specifically the testimony of Dr. Ofshe. The California case was People v. Page, 2 Cal.App.4th 161 (1991). In that case the defendant sought the admissibility of expert testimony in three categories as follows:

> "(1) the general psychological factors which might lead to an unreliable confession, along with descriptions of the supporting experiments; (2) the particular evidence in Page's taped statements which indicated that those psychological factors were present in this case; and (3) the reliability of Page's confession given the overall method of interrogation." (Id., at p. 183, emphasis in original.)

The trial court allowed evidence in category one but not two and three. The reviewing court upheld these restrictions:

> ". . .Professor Aronson outlined the factors which might influence a person to give a false statement or confession during an interrogation. Having been educated concerning those factors, the jurors were as qualified as the professor to determine if those factors played a role in Page's confession, and whether, given those factors, the confession was false." (Id., at p. 189.)

In our case, trial counsel limited his request to category one. (7 CT 1727-1728,

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[25] A more recent case disallowing the testimony of Dr. Leo is People v. Ramos, 121 Cal.App.4th 1194 (2004), a decision from the California Court of Appeal, Second District. The reviewing court found no abuse of discretion in the exclusion of Dr. Leo's testimony on police interrogation techniques and false confessions because the defense extensively cross-examined the officer on the interrogation techniques he used in the interview of Ramos and other witnesses and called witnesses who attested to the officer threatening them and attempting to coerce statements from them.

3 RT 384-385.) Page is thus authority for defense counsel's request.

Other cases authorizing the admission of Dr. Ofshe's testimony specifically or testimony like it include United States v. Shay, 57 F.3d 126, 133 (1st Cir. 1995) [error to exclude psychiatric testimony that the defendant suffered from a mental disorder that caused him to make false statements against his interest]; United States v. Hall, 93 F.3d 1337 (7th Cir. 1996)[reversible error in refusing to hold a full Daubert hearing before excluding Dr. Ofshe's testimony regarding false confessions and the indicia recognized as present when that is likely to occur]; United States v. Hall, 974 F. Supp. 1198 (C.D. Ill. 1997) [Dr. Ofshe found to be a qualified expert who could testify "that false confessions do exist, that they are associated with the use of certain police interrogation techniques, and that certain of those techniques were used in Hall's interrogation; Dr. Ofshe could not explicitly testify about matters of causation, specifically whether the interrogation methods used in this case caused Hall to falsely confess]; Boyer v. State, 825 So.2d 418 (2002) [reversible error due to exclusion of Dr. Ofshe's testimony as to "a phenomenon that causes innocent people to confess to a criminal offense; police techniques that secure false confessions under certain circumstances; and his explanation of the parameters within which one can evaluate a confession to determine its veracity]; Miller v. State, 770 N.E.2d 763 (Ind. 2002) [exclusion of Dr. Ofshe's expert testimony to assist jury in understanding psychology of interrogation of mentally retarded persons deprived defendant of opportunity to present a defense, requiring reversal]; State v. Conn., 370 A.2d 1002 (Ct. 1976) [testimony of psychologist admissible to assist jury in considering weight and credibility of confession].

In short, at the time appellate counsel was handling Petitioner's direct appeal, there was one California appellate court case supporting the admission of

the type of expert testimony sought herein, and one specifically declining to admit Dr. Ofshe's testimony as well as caselaw from the federal courts and other states authorizing its admission and finding reversible error when it was excluded. Under such circumstances, appellate counsel Romero was ineffective in failing to raise this issue. First, there was no California Supreme Court case squarely holding such evidence inadmissible, thus appellate counsel was free to argue that the Son case, the only negative published decision at that time, was ill-reasoned and should not be followed or to distinguish it factually from the instant case. Further, the Sixth District Court of Appeal was not bound by a decision of the Fourth District, the district that decided Son. (Nabors v. Worker's Compensation Appeals Board, 140 Cal.App.4th 217, 226 (2006); Greyhound Lines, Inc. v. County of Santa Clara, 187 Cal.App.3d 480, 485 (1986).) Second, counsel had a plethora of favorable authority from other states as well as federal appellate courts upon which to base an argument that it was error to exclude the expert testimony in question. While not binding on the California state reviewing court, the decisions of other state and federal courts are persuasive. (Barnett v. Rosenthal, 40 Cal.4th 33, 58 (2006); People v. Reilly,196 Cal.App.3d 1127, 1135 (1988) [in considering the general acceptance of a new scientific technique, "a court should examine relevant decisions from other jurisdictions on the question of consensus"].) Further, appellate counsel had an obligation to advance the law in the face of contrary authority per Feggans, supra, as described in Appeals and Writs in Criminal Cases (2d Ed., Section 1D.42, p. 201).

In the case at bar, appellate counsel could have made a compelling argument that the trial court's exclusion of Dr. Ofshe or Leo's testimony was reversible error. The only negative California authority at the relevant time, Son, was readily distinguishable as in that case, the defendant gave a specific reason as

to why he falsely confessed. Thus there was no reason for Dr. Ofshe in that case to describe police tactics that result in false confessions. (Son, supra, 79 Cal.App.4th 224, 241.) That is not the case here. Both Dr. Ofshe and Dr. Leo had been found to be experts in the relevant subject area in other published decisions. (Hall, supra, 974 F.Supp. 1198.) Dr. Leo has since implicitly been so found. (Scott v. Texas, 165 S. W.3d 27 (Tex.App. 2005); Ramos, supra [no objection in either case that Dr. Leo was not an expert in the field about which the defense sought his testimony].) The scope of expert testimony Petitioner sought to have admitted was in line with what the Page court had approved some years earlier. The court's expressed reason for excluding the expert testimony in this case, that such testimony was not necessary to help the jury resolve the issue of witness credibility was not well taken inasmuch as, as more fully set forth in the preceding subsection, defense counsel specifically indicated he would not be asking his expert to render an opinion on the credibility of the particular false statement by Michael Leon but rather would allow the jury to draw their own conclusion in that regard. Further, the trial court could have admitted the testimony then sustained individualized objections to any testimony that appeared to cross the line into improper opinion as to witness credibility. (State v. Miller, supra, 770 N.E.2d at p. 774.) Indeed, defense counsel was prepared to limit his expert in the manner approved by the court in United States v. Hall, supra, 974 F.Supp. at p. 1205 ["It is beyond Dr. Ofshe's knowledge as a social psychologist to assess the weight of the evidence and the credibility of witnesses."]. Further, appellate counsel could have argued that the fact that the court decided it did not need expert testimony to assist it in its determination that Michael Leon's statement was voluntary was similarly not a principled basis to exclude the proffered expert testimony. As stated in Miller v. State, supra, "The trial court's threshold determination of sufficient voluntariness for admissibility of

the videotape did not preclude the defendant's challenge to its weight and credibility at trial." (770 N.E.2d at p. 773.) Also see Hall, supra, 93 F.3d at p. 1344.)

Further, appellate counsel could have made an equally compelling argument that the refusal to allow the requested expert testimony was prejudicial error warranting reversal. Michael Leon's alleged statement that Petitioner essentially admitted the crime to him, stating it had been committed in self-defense was one of the centerpieces of the prosecution's case, right alongside Danette Edelberg's claim that Petitioner had not only admitted to her that he committed the murder but reenacted it as well to her. Indeed, the prosecutor argued the importance of Michael Leon's statement in the scheme of the case during his opening argument to the jury. (22 RT 2563-2564.) Petitioner's defense depended upon his ability to demonstrate the unreliability of his father's highly incriminating statement to the police. Counsel's cross-examination of Mr. Leon was no substitute for the requested expert testimony, for if it were, such testimony would never be admitted on the theory that the defense could always elicit coercive factors on cross-examination. Cases allowing such expert testimony implicitly demonstrate that cross-examination of the witness making the statement or the police officer taking it is not an adequate substitute.

During the state habeas proceedings, appellate counsel Lynda Romero provided a declaration as to why she did not raise this issue.. In said declaration (attached hereto as Exhibit F), she states she had familiarity with the issue from two prior cases and had actually raised it on appeal in one case. In evaluating the issue, she reviewed several cases, which included People v. Son, supra, the case upon which the People relied in arguing against the admission of the expert testimony and two Evidence Code sections. She also listened to the tape of Michael

Leon's interview with police which she opined did not show that any coercive tactics were used. She also felt that establishing prejudice from the exclusion of the requested testimony would be problematic and that the fact that the testimony in question was that of a witness as opposed to a defendant impacted the viability of the issue. She vaguely recalls discussing the issue with trial counsel.

Petitioner contends that Ms. Romero's explanation for her failure to raise this issue is unavailing. First, although she claims familiarity with the issue, it is clear that her research was inadequate as she failed to review the Page case from California that would have supported the admission of the expert testimony in this case as well as the numerous authorities from other jurisdictions cited above in existence at the time Petitioner's direct appeal was pending which would have supported it as well and which in some instances found reversible error in its exclusion. To analogize to IAC in the trial counsel context, Ms Romero made a tactical choice based on an inadequate investigation. As such her choice is not entitled to the deference of this court:

> "'Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (Wiggins v. Smith (2003) 539 U.S. 510, 123 S.Ct. 2527, 2535; also see Sanders v. Ratelle (9th Cir. 1994) 21 F.3d 1446, 1456.)

Second, the case she had personally handled on appeal which involved an unfavorable and unpublished disposition of this same issue, People v. Hall, 78 Cal.App.4th 232 (2000) was from the Fourth District. The Sixth District appellate court, which reviewed Petitioner's appeal, was not bound to follow Hall if the relevant portion of the case had been published. (Nabors v. Worker's

Compensation Appeals Board, supra, 140 Cal.App. 4th at p. 226.)

Third, Ms. Romero's negative judgement of the issue based on her own review of the tape of Michael Leon's police interview does not warrant excluding the issue from Petitioner's direct appeal. She was not qualified to judge whether or not coercive tactics were used in extracting the statement from Mr. Leon. As more fully set forth above, the whole point of the proffered testimony, as argued by defense counsel, was that such techniques were subtle and not necessarily apparent to untrained eyes.

Fourth, Ms. Romero's conclusion that the issue was not worthy of arguing because the coerced statement testimony was that of a witness as opposed to a defendant is similarly not well taken. While it is true that the applicable cases happens to involve statements by defendants, nothing in those cases indicates they do not apply to witness statements as well.

Attached hereto as Exhibit G is the declaration of Sam Polverino, Petitioner's trial counsel, a veteran of many homicide trials and a certified specialist in criminal law, provided during the state habeas proceedings. Mr. Polverino's assessment of the issue is that it was a critical one because of the importance of Michael Leon's testimony to the prosecution's case and that its exclusion deprived Petitioner of his right to a fair trial. Further, Mr. Polverino recalls discussing this issue with appellate counsel and so informing her of this opinion.

7. Ms. Romero's assessment that the error in excluding the expert testimony was harmless is unavailing. She indicated in her declaration (Exhibit F) that Petitioner's father's statements were not the most damaging evidence of guilt, and that even if his statements had been excluded, there was other more damaging evidence of guilt sufficient to sustain the conviction. She points to the testimony of Danette Edelberg and her brother, Shelby Arbuckle, as to Petitioner's admission of

guilt and his reenactment of the crime which she characterizes as the strongest evidence of guilt. She also points to Bernard Wesley's testimony as to Petitioner's admissions concerning the crime and Danette Edelberg's testimony as to Petitioner's admission he was with Marlon Bass on the day of the murder. She also opines that Michael Leon's testimony that he had been drinking before the police interviewed him provided an alternative attack on his statements to the police and gave the jury a basis to reject said statements.

Appellate counsel's argument as to lack of prejudice is unpersuasive. Petitioner has in Claim II above, paragraph 6, addressed in detail and with particularity how the evidence of guilt against him was not strong, when critically analyzed. Petitioner incorporates that discussion here.

Defense trial counsel argued that Michael Leon had been drinking at the time he was interviewed by the police and that the statements were "a product of how police get the information they want when they want to build a case against somebody." (22 RT 2629-2630.) It will be recalled that Michael Leon testified that he felt pressured and threatened. (15 RT 1832, 1851.) Counsel continued:

> "And the way the police operate is that there is this, they provide inducements and they provide threats. You could be an accessory. All of these sorts of threats that are addressed to somebody. At the same time they are providing inducements; this could help your son, just tell us what was told to you. It was self-defense, just tell us. . .
>
> What you have is their [sic] is a gradual inducements of threats and inducements. And inducements and threats. Sometimes it works with respect to Mr. Leon, sometimes it doesn't."
> (22 RT 2630.)

Defense counsel's argument rang hollow without any expert testimony to support it, leaving the jury free to reject it as lacking in evidentiary support. The absence of Dr. Leo or Ofshe thus cast a long shadow over this case. Without the necessary expert testimony, counsel's argument concerning the coerced nature of Michael

Leon's statement to police was doomed to failure. As caselaw has observed, jurors tend to ascribe great importance to expert testimony by a qualified expert as it has an aura of special reliability and trustworthiness. (United States v. Rosales 19 F.3d 763, 766 (1st Cir. 1994.).)

Based on the foregoing, Petitioner contends that he was deprived of the effective assistance of appellate counsel due to her failure to raise on direct appeal the issue of the trial court's exclusion of expert testimony concerning police coerced statements. As demonstrated above, the issue had a reasonable potential for success. Not only did counsel have favorable authority on which to rely but she could have shown the prejudice to Petitioner's case of the exclusion of the requested testimony. Her failure to raise the issue "undermines confidence in the outcome." (Strickland v. Washington, supra.)

8. The state court's decision on this issue was an unreasonable application of Strickland, warranting habeas relief. The only reasoned state court decision on this point was the Superior Court's order denying relief on April 18, 2007, attached hereto as Exhibit D. The court determined the issue in question was arguable but appellate counsel's failure to raise it was harmless.

The Superior Court points to the California Court of Appeal's summation of Michael Leon's statement including that Mr. Leon testified that he had lied to the police as evidence that the jury should not take his statements to the police at face value, and thus a lack of prejudice as to the exclusion of the expert testimony. (Exhibit D, p. 3.) However, the jury would likely view such testimony as self-serving, given that it came out of the mouth of Petitioner's father, a man the jury was equally likely to view as having a strong motive to help his son. Obviously, an expert was required to provide a more impartial view as to why the jury should not take Mr. Leon's statements at face value. As previously observed,

it is axiomatic that jurors give great importance to expert testimony by a qualified witness.

The Superior Court also points to the California Court of Appeal's description of the alleged strength of the evidence against Petitioner, specifically that incriminating evidence came from Petitioner himself, that Daniel Barnett testified that Petitioner threatened Marlon, that Shelby Arbuckle testified that Petitioner knew many details about the crime and professed to have hired someone to commit the burglary, that Danette Edelberg testified that Petitioner admitted the crime to her, that defendant told his father he had acted in self-defense, that Bernard Wesley testified that Petitioner approached him to commit the burglary, and that various witnesses testified that Petitioner seemed to have money after the murder. (Exhibit D, p. 3.) As noted above, this evidence breaks down on careful analysis and thus is not overwhelming in favor of Petitioner's guilt. For example, Shelby Arbuckle had good reason to be biased against Petitioner because of Petitioner's alleged abuse of him and kept quiet about Petitioner's admissions for years until shortly before his testimony. As for Daniel Barnett's trial testimony that Petitioner supposedly threatened to kill Marlon, he had testified differently at the Preliminary Hearing, i.e. that Petitioner threatened to kick his ass, which statement could have been made one to two years before the murder. (9 RT 989, 991.) In the preceding section, Petitioner has pointed out the numerous weaknesses, inconsistencies and lies by Danette which show that her testimony was not as strong as this Court stated in its earlier opinion in this case. The same holds true as to Bernard Wesley and Petitioner incorporates those comments rather than repeat them here. In terms of Petitioner appearing to have money after the crime, it bears repetition that he was employed at the time and had recently received an insurance settlement plus sold his car.

In sum, the reasons given by the Superior Court for denying Petitioner's Petition do not withstand reasoned analysis and reversal is required.

CONCLUSION AND PRAYER FOR RELIEF

Wherefore, Petitioner respectfully prays that this Court:

1. Order Respondent to answer this petition by specifically admitting or denying each allegation and claim herein and provide a copy of the state record herein;

2. Grant Petitioner leave to file a traverse, or reply, or additional points and authorities, following the filing of Respondent's answer;

3. Grant Petitioner a reasonable opportunity to supplement or further amend his petition to include claims, facts and evidence which becomes apparent from future investigation, discovery or other event, and to fully develop the facts and law related to the claims set forth herein;

4. Order such hearings as may be necessary;

5. After full consideration of the issues raised, issue a writ of habeas corpus relieving Petitioner from the judgment of conviction and sentence imposed in Santa Clara County No. C1C093326, the underlying matter; and

6. Grant such other and further relief as is just and appropriate.

Dated: 11/8/07

Respectfully submitted,

_____
JULIE SCHUMER, Attorney
For Petitioner DAVID MICHAEL LEON

VERIFICATION

I, JULIE SCHUMER declare:

1. I am attorney admitted to practice before the courts of the State of California and am admitted to practice before this court. I maintain my office in Contra Costa County, California. I represent David Michael Leon, the Petitioner herein. He is presently confined and restrained of his liberty at Pleasant Valley State Prison in Coalinga, California.

2. I have personally reviewed all of the records on file in the California court pertaining to this matter. All the facts stated in the Petition are supported by citations to the record and exhibits.

3. I am authorized to file this petition for writ of habeas corpus on Petitioner's behalf. Because Petitioner is incarcerated in a different county than the one in which my law office is located, and because he is not in a position to make the necessary verification himself, I make this verification on his behalf.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 8, 2007 at Lamy, New Mexico.

_____
JULIE SCHUMER

CERTIFICATE OF SERVICE

I declare that my business address is in Contra Costa County. Said address is PMB 120, 120 Village Square, Orinda, CA 94563. I am over the age of 18 years and not a party to this action. On November 8, 2007, I served the foregoing

PETITION FOR WRIT OF HABEAS CORPUS AND EXHIBITS IN SUPPORT OF PETITION

on all parties in this cause by placing a true and correct copy thereof enclosed in a sealed envelope with first class postage fully prepaid in the United States mail at Santa Fe, New Mexico, addressed as follows:

Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed November 8, 2007 at Lamy, New Mexico.

_____
JULIE SCHUMER